

ILLINOIS POLLUTION CONTROL BOARD  
December 17, 1992

NORTH SHORE SANITARY DISTRICT, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 92-92  
 ) (Variance)  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY )  
 )  
 Respondent. )

OPINION AND ORDER OF THE BOARD (by J. C. Marlin):

This matter comes before the Board on an amended petition for variance filed on August 19, 1992, by the North Shore Sanitary District (NSSD). The amended petition requests a variance from the construction completion date in 35 Ill. Adm. Code 304.219(c), a site-specific rule applicable to NSSD's Waukegan Treatment Plant in Lake County. On September 22, 1992, the Illinois Environmental Protection Agency (Agency) recommended that the variance be granted. NSSD waived hearing, and none was held. The complex procedural history is discussed in greater detail below.

Section 35(a) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1035(a)) authorizes the Board to grant individual variances whenever it finds that "compliance with any rule, regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship". The procedural rules in 35 Ill. Adm. Code 104 govern variance actions.

FACILITY DESCRIPTION

NSSD is a municipal corporation which provides sanitary sewer service in Lake County. It operates several sewage treatment plants (STPs), including the Waukegan STP. The details in the amended petition and recommendation are sketchy. However, based on the Board's Opinion in R86-3, which is discussed below, the Waukegan STP is an activated sludge plant with a design capacity of 19.8 million gallons per day (MGD) and an average dry weather flow of 14.1 MGD. Although the STP is located near Lake Michigan, its normal discharge is pumped about five miles to the Des Plaines River. The STP also has a combined sewer overflow (CSO) which discharges to Lake Michigan, and which is the subject of this variance. (R86-3, p. 3.) The STP is not capable of providing full treatment during wet weather conditions, resulting in CSO by-passes to Lake Michigan of partially treated sewage. (R86-3, p. 4.) These discharges violate the Lake Michigan phosphorus effluent standard set forth in Section 304.123(a), of

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1.0 mg/L (as P). These discharges have been associated with eutrophication in the Lake in the vicinity of the outfall. (R86-3, p. 16.) The plant is being expanded to a maximum peak-flow capacity of at least 44 MGD. (Am. pet. p. 2)

#### BACKGROUND

Section 304.123(a) sets a phosphorus standard of 1.0 mg/L (as P) for discharges to Lake Michigan.<sup>1</sup> NSSD filed a petition for a site specific rule in R86-3, In the matter of the petition of the North Shore Sanitary District to amend regulations. On November 3, 1988, the Board entered a final opinion and order adopting Section 304.219, which governs the Waukegan STP in lieu of Section 304.123(a) (93 PCB 333). Although the site specific allows NSSD to occasionally discharge phosphorus in excess of the generally applicable standard, it also requires facilities upgrading which will greatly reduce the frequency and duration of overflow and by-passing events. The upgrading will result in a much lower mass discharge of phosphorus to the Lake than could be accomplished by treating the overflows to comply with the general standard. (R86-3, p. 5-9, 22, 24, 27.) Section 304.219(c) requires NSSD to increase the maximum peak treatment flow capacity of the Waukegan STP to at least 44 MGD before January 1, 1992. The upgrading would qualify NSSD to be regulated under the site-specific requirements established in R86-3.

The site-specific rule was adopted on November 3, 1988. NSSD received bids on the project in February, 1991, some 26 months later. (Rec., par. 4.) Although the Agency views this as a reasonable time (Rec., par. 4), NSSD apparently then failed to proceed for some period of time pending the loan commitment and legislative approval of matching funds (Rec., par. 3). On April 1, 1991, the Agency approved a \$22.5 million loan for expansion of the STP. (Am. pet., p. 2.) The loan included a construction schedule leading to completion by May 31, 1993, nearly 17 months after the date required by the Board order. The loan included a condition that, by May 1, 1991, NSSD file "an amended petition" with the Board for a change in the construction completion date. Final resolution of the request was to be by December 31, 1991. (Am. pet., p. 2 and Ex. A.)

On April 22, 1991, NSSD filed an "amended petition" captioned under R86-3, the closed site-specific Docket. On April 25, 1991, the Board entered an order stating that it would not

<sup>1</sup>Section 304.123 was amended on April 12, 1990, in R87-6, at 14 Ill. Reg. 6777, effective April 24, 1990. The amendments concerned phosphorus discharges to other lakes.

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accept the petition. The Board indicated that NSSD should file a variance petition pursuant to 35 Ill. Adm. Code 104.<sup>2</sup>

NSSD states that it never received a copy of the Board's April 25, 1991, Order in R86-3. NSSD claims that it first learned of the order on June 9, 1992, when the Agency called to inquire about compliance. (Am. pet., p. 3)

#### VARIANCE PETITION

NSSD filed its original petition for variance on June 19, 1992. The Board entered a more information order on July 9, 1992, noting numerous deficiencies in the petition, including the following: failure to request or waive a hearing, or to provide an affidavit with any waiver (Section 104.124); and, failure to provide information required under Sections 104.121(b), (d), (g), (j), (k) and 104.122(b), including a statement as to why petitioner believes it would suffer an arbitrary or unreasonable hardship.

NSSD responded to the more information order with a letter dated August 13, 1992, and the amended petition of August 19, 1992. The amended petition was followed by two lengthy engineering reports under a cover letter dated August 19, 1992.

The amended petition stated that NSSD waived "hearing on the Petition if the Board feels that the enclosed material and other material heretofore filed is adequate". On September 3, 1992, the Board entered an order noting that NSSD had still failed to provide a clear request for hearing or waiver of hearing, as required by 35 Ill. Adm. Code 104.124, and the Board's July 9, 1992, order. The Board accepted NSSD's statement as a waiver of hearing, but made no determination as to the adequacy of the material filed. The Board also noted that the amended petition restarted the time clock for the decision deadline (Section 38(a) of the Act).

<sup>2</sup>Docket R86-3 was closed following adoption of Section 304.219. Therefore, a regulatory petition to amend that Section would have to be a new petition in a new Docket. However, it would have been difficult, if not impossible, to have accomplished the procedural steps needed to amend the rule before December 31, 1991. In particular, NSSD would have had to have requested and received a negative economic impact study determination prior to June 25, 1991. (Section 27(a) of the Act, prior to P.A. 87-860.) On the other hand, if a variance petition had been filed on May 1, the Board could have completed a variance before September 1, 1991, the statutory deadline under Section 38 of the Act.

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### AGENCY RECOMMENDATION

The Agency filed its recommendation, pursuant to Section 104.180, on September 22, 1992. The Agency, noting that the delay was caused by NSSD's board's failure to commit to funding the project because "the legislature had not approved matching funds", stated that it believed that unavailability of State loan funding by itself was insufficient to cause an arbitrary or unreasonable hardship. (Rec., par. 3.) However, the Agency stated that, in this particular case, it believed that NSSD had proceeded with its project in a timely fashion, despite the delay in loan funding. (Rec., par. 4)

The Agency also recommended that the Board grant a variance retroactive to January 1, 1992. The Agency notes that the Board has granted retroactive variances in certain situations. (DMI v. IEPA, PCB 90-227, 128 PCB 241, 246, December 19, 1991.) The Agency believes that the late filing was not solely the fault of NSSD, and that a retroactive variance is appropriate. (Rec., par. 6.)

### DISCUSSION

NSSD has couched its variance request as a variance from the Board's order in R86-3, in which the Board adopted Section 304.219(c), the site specific rule which established the construction schedule for the Waukegan STP. However, the more appropriate relief is a variance from the rule itself. The Board therefore construes the petition as a request for a variance from Section 304.219(c).

The confused procedural history in this matter makes it difficult for the Board to ascertain all of the facts. However, it appears that the original construction schedule in R86-3 may have been overly optimistic. This, coupled with the delay in processing the loan application, has forced the petitioner into a compliance schedule extending beyond that specified in Section 304.219. Denial of the variance would jeopardize NSSD's loan, and could result in further delays in this much needed project. The Board finds that the loss of the loan, and the continuing environmental damage from further delays would impose an arbitrary or unreasonable hardship. The Board will grant the variance from Section 304.219(c), through May 31, 1993, subject to conditions similar to those recommended by the Agency.

The Board will not take the extraordinary step of making the variance retroactive, which would shield NSSD from prosecution based on past failure to comply with the regulations. Although retroactive variances may be justified where a petitioner has filed a timely variance petition, they are not granted where the delay was through some fault of the petitioner. (DMI v. IEPA, PCB 90-227, 128 PCB 241, 246, December 19, 1991.) Although the

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procedural confusion surrounding the April 22, 1991, filing with the Board might arguably justify a three-month retroactive extension<sup>3</sup>, there was still plenty of time to file a timely variance petition, which could have been granted before January 1, 1992. Moreover, this three-month delay is offset by the unexplained delay in awarding contracts after February, 1991. The Board cannot say that the petitioner was "without fault" in these delays. In addition, the confused pleadings in this Docket, and lack of complete information about what transpired at earlier stages, leave the Board with inadequate information to determine to which time periods a retroactive variance might justifiably apply.

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

#### ORDER

Petitioner, North Shore Sanitary District (NSSD), is granted a variance from 35 Ill. Adm. Code 304.219(c) with respect to its Waukegan sewage treatment plant (STP), subject to the following conditions:

1. This variance will begin on the date of this order and will terminate upon completion of the construction on the STP, or on May 31, 1993, whichever comes first.
2. NSSD shall comply with all other aspects of the R86-3 order dated November 3, 1988, including all sampling criteria related to determining the impacts of combined sewer overflow events.
3. NSSD shall comply with all aspects of NPDES Permit No. IL 0030244.
4. NSSD shall apply to the Agency for any required permits in a timely manner. NSSD shall not begin construction before receiving all required permits.
5. Within 45 days after the date of this order, petitioner shall execute and forward to:

<sup>3</sup>That is, up to the time the negative EcIS determination had to be made, plus one month to prepare the petition, as explained in footnote 2 above.

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Mr. Charles Feinen  
 Division of Legal Counsel  
 2200 Churchill Road  
 P.O. Box 19276  
 Springfield, IL 62794-9276

a certificate of acceptance and agreement to be bound by all terms and conditions of this variance. The 45-day period will be held in abeyance during any period that this matter is being appealed. Failure to execute or forward this certificate within 45 days will render the variance null and void. The form of the certificate is as follows:

**CERTIFICATION**

I (We), \_\_\_\_\_,  
 hereby accept and agree to be bound by all terms and conditions of the Pollution Control Board's December 17, 1992 order in PCB 92-92.

Petitioner: \_\_\_\_\_

Authorized Agent: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

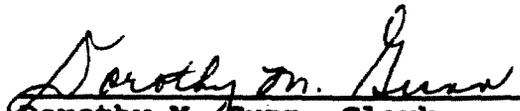
IT IS SO ORDERED.

B. Forcade concurred.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 17<sup>th</sup> day of December, 1992 by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

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