ILLINOIS POLLUTION CONTROL BOARD
October 30, 1975

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| IN THE MATTER OF | ) | |
| | ) | R71-19 |
| SEWER CONNECTION BANS | ) | |

OPINION OF THE BOARD (by Mr. Dumelle):

This Opinion supports our September 29, 1975 Order adopting Rule 604, New Connections, as an addition to Chapter III, Illinois Pollution Control Board Rules and Regulations.

This proceeding originated with the authorization, on July 26, 1971, of public inquiry hearings in order to explore the overall effects of the existence or absence of sewer connection bans on affected communities. The Board had imposed such bans on several communities throughout the Spring of 1971. See, e.g., League of Women Voters v. North Shore Sanitary District, PCB 70-7, 1 PCB 369 (March 31, 1971). In each such case the ban was imposed on the basis of a record showing that the addition of new wastes would cause additional pollution, but the parties did not present evidence as to the benefits and detriments of the sewer ban as a remedial measure. A total of seven hearings were held from September 17, 1971 to November 9, 1971. As a result of those inquiry hearings the Board issued a proposed regulation on December 21, 1971. That proposed regulation, published in Board Newsletter #39, December 27, 1971, called for: 1) a permit requirement for all new sewer connections, including those serving sources with a population equivalent (P.E.) less than fifteen;* 2) a reservation of capacity system whereby a potential builder could obtain a binding commitment of available capacity in advance of making a substantial commitment of resources; 3) allocation of additional load "credit" to severe hardship cases where interim improvements have been made; 4) a set of factors to be considered in variance cases; 5) public records, published by the Environmental Protection Agency, of communities affected by sewer bans.

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*The then current Rule 903(b), Chapter 3, PCB Rules and Regulations, exempted from permit requirements sources designed and intended to serve single buildings and to eventually treat or discharge the sewage of fifteen or less persons. This exemption is now found in Rule 951(b)(2) and is expressed as 1500 gallons per day- the functional equivalent of 15 P.E.

An alternate regulation, designated as R72-19, was subsequently proposed by the Illinois Home Builders Association. Essentially, it called for compulsory, automatic treatment plant expansion when a plant reached a certain capacity. This proposal was consolidated with R71-19 and hearings were held on January 25 and February 26, 1973. The Board issued an Opinion and Order dismissing R72-19 on May 17, 1973 (8 PCB 53).

As a result of these hearings, and public comment received thereafter, the Board proposed for final public comment a revised version of the regulation on August 5, 1975 (Environmental Register #107, p. 8-9). A public comment period extended to September 8, 1975, and the final version of the regulation was adopted September 29, 1975.

Testimony received in the inquiry hearings in this proceeding revealed two dominant themes: 1) the overriding necessity to halt additional sewer connections in communities faced with overloaded sewer or treatment facilities; 2) the severe economic hardship that such an action imposes on builders, developers, and other individuals who have invested funds for construction projects, in anticipation of being able to connect to sewage systems. With respect to this latter issue, a large number of witnesses, from small property owners to large housing developers, testified as to the amount of money they had spent prior to discovering that additional sewer connections would not be allowed. In each instance the witness had been given no notice that a sewer ban was likely or that sewers and treatment plants were approaching, or had surpassed, capacity.

One such developer reviewed the process of land development, pointing out the long lead time needed for acquisition, planning, financing and construction. His particular project had begun four years previous to the hearing, with an investment of over one-half million dollars in land alone. (R. 526, 535). Additional expenses included substantial contributions to the village water supply facilities, financial obligations regarding extension of sewer mains, and continuing interest payments on borrowed capital (R. 532, 535).

Similar testimony was received from other witnesses-from a single lot property owner who had bought his land, installed sewers and paid taxes to his sanitary district before the Environmental Protection Act even existed (R. 946), to larger developers who had projects in various stages of completion prior to the imposition of a sewer ban in their communities (R. 191, 289, 764, 810, 819 ff., 841-845, 869, 883 ff.).

Significantly, many of these witnesses complained that there was no notice given that their land might be subjected to a ban, or that they had been unable to get a list of communities that might be under critical review for sewage facilities (R. 289, 421-2, 442, 1115). In addition, several of these witnesses indicated that they could in fact support a sewer ban in some situations, provided there had been sufficient prior notification (R. 575, 1096). Testimony by an Environmental Protection Agency attorney corroborated these complaints, in that he confirmed that the Agency did not have any centralized list of organic and hydraulic capacity of all the plants in the state. He said that in the past notification of critical review status, initiated at 80% organic capacity, was given only to the operator of a treatment plant, but that henceforth the Agency would issue press releases to all concerned communities and "do anything that we can to inform the citizens of what the problems of the plant are and what type of necessary action citizens can take to encourage the authorities to move ahead as quickly as possible" (R. 1645-6).

In response to this testimony Mr. Kissel, sitting as a Board member at the hearing, suggested the possibility of a regulation requiring the Agency to publish a list of the capacity of all treatment plants in the state, putting all people on notice as to where permits were going to be denied (R. 1657). The Agency, while agreeing that notice should be given as widely as possible, felt that it would be impractical to publish such a list, since situations change so rapidly. It indicated that the information is readily available with respect to any particular plant, and that it would prefer to keep it on an individual basis (R. 1658, 1660). Mr. Kissel disagreed, feeling that such an objection depended on the frequency of publication. The Agency witness did conclude, however, that "there should be as much broad notice on these situations as is possible; and ... our former procedure of just notifying the officials has resulted in some cases of notice not being widely spread among the citizens" (R. 1661).

As a result of the testimony summarized above, the Board included in its original proposed regulation a requirement that the Agency publish and make available to the public an up-to-date list of communities subject to restricted status and critical review. It was felt then, and now, that such publication would best effect the wide notice desired and thus assuage many of the hardships complained of. With such notice developers can plan their

projects accordingly, without risking substantial funds on the possibility that they would be left with useless investments, complete but for final authority to connect the sewers.

Testimony in the follow-up consolidated hearings pointed out an additional benefit which might come from such public notice, in that it would serve notice to the citizenry that their officials had not done their job in assuring adequate sewage facilities (January 25, 1973 transcript, p. 113), and that it might be helpful in raising funds to expand, since the Agency would have more credibility than the operating entity of a local agency (February 26, 1973 transcript, p. 16).

As a result of public comment received on the original proposal, the other major aspects of the regulation-- the permit requirement and reservation of capacity system-- were discarded as being unnecessary or too burdensome to administer. The one comment received with respect to the publication requirement (from the City of St. Charles) was favorable.

The revised version of the regulation, published August 5, 1975, contained an added provision whereby sanitary districts were required to report to the Agency all connections made and the estimated increase in P.E. Most of the unfavorable comments received on the new proposal were concerned with the added paperwork involved in this provision. In the adopted version of the regulation this provision was abandoned, since that type of reporting is already done for sources over fifteen P.E., and for other sources would be reflected on the monthly operating reports already required by the Agency. An Agency comment suggested an alternative regulation which simply would have made it unlawful for sanitary districts to allow any new connection if it would cause a violation of the Environmental Protection Act. Such a regulation would not accomplish the public notice purpose intended here, nor would it be absolutely necessary to achieve its own goals, since the general prohibition of water pollution found in Section 12(a) of the Act is broad enough to impose liability in such situations. The Agency further commented that the notice requirement is unnecessary, since such notice was already a standard practice. If such is now the case we feel it would be beneficial to formalize such notice into standard, periodic, published lists which will insure the broadest scope of public knowledge and information.

An explanation of the individual provisions of the regulation follows.

## Rule 604: NEW CONNECTIONS

(a) Publication of Lists. This paragraph constitutes the heart of the public notice requirement. It is the only remaining requirement from the original proposal that followed the inquiry hearings. Publication of a list of sanitary districts and other wastewater treatment or transportation authorities subject to restricted status or critical review will best insure that all interested individuals be informed of development limitations in the affected communities. The responsibility of proceeding with investment or construction would then be borne wholly by the individual, in full knowledge that sewer connection permits might not be available upon completion. While sophisticated developers may now check with the Agency, anyway, to determine the treatment and sewer capacity of a certain community, the published list will provide such information to many other individuals who might be desirous of developing their property. It is felt that publication intervals of three months will be adequate to cover any changing situations that occur. Any longer period would not be useful for planning purposes. The lists are required to include estimates of capacity and periodic additions of P.E. in order to show how rapidly a community is approaching capacity.

(b) Restricted Status; (c) Critical Review. These paragraphs are added in order to define the terms "restricted status" and "critical review" as used in §604(a). Since one of the functions of this regulation is to codify a present Agency permit-issuing procedure, the terms are purposely defined on the basis of Agency determinations. They are thus not intended to infringe on the Agency's permit-issuing responsibilities under Section 39(a) of the Environmental Protection Act. Furthermore, it is not anticipated that an Agency determination to place a sanitary district (or a portion thereof) on "restricted status," will necessarily preclude the issuance of all connection permits. A special showing by a permit applicant that the requested connection would not result in a violation of the Act or regulations remains possible. Such a showing was made in at least one case before the Board by a petitioner who appealed an Agency permit denial in an area designated "restricted status." That petitioner planned to install a five day sewage holding tank to prevent violations. First National Bank and Trust Company of Evanston, Trustee of Trust No. R-1692, and S.S. Kresge Co. v. EPA, PCB 74-308, 14 PCB 423 (1974).

(d) Notification of Individuals Requesting Connections. This paragraph is intended to prevent connections by individuals who fail to discover or ignore the requirement to obtain a permit from the Agency. A number of cases have come before the Board in which a petitioner for variance from the permit requirement has already connected his facility to the restricted system. See, i.e., First United National Corporation v. EPA, PCB 75-196, 18 PCB 187, in which a Springfield restaurant had been in operation, without a sewer connection permit, over a year before even seeking a variance. Significantly, in that case the Agency pointed out that the petitioner should have known of the restricted status of the sewer system since it had been highly publicized in the Springfield area. 18 PCB at 189. The requirement in paragraph (d) that individuals who seek connections be notified by the sanitary district or other wastewater treatment or transportation authority of the restricted status will guard against ignorance of the permit requirement and help prevent such unauthorized connections. An individual so forewarned who proceeded to connect anyway would then stand on weak ground to object to a Board order to disconnect in any subsequent enforcement action.

Although Agency permits will not be needed for some sources (those designed and intended to serve single buildings and treating or discharging less than 1500 gallons per day of domestic sewage), the regulation requires notice to all individuals seeking connection. This is intended to avoid disputes in the borderline area where it is not known if a source will qualify for the exception.

(e) Appeal. The Board recognizes the severe financial burden imposed on a community by an Agency determination to place it on restricted status. Such a determination, we feel, should be subject to at least remedial due process requirements. While aggrieved persons may appeal individual permit-denials or seek variances before the Board, there has previously been no procedure by which a community at large could appeal such a determination. Very real differences of opinion could exist wherein the sanitary district or other wastewater treatment or transportation authority felt that its design or hydraulic capacity had not been reached and that additional connections were possible without violations of the Act or regulations. A public comment received from the Springfield Sanitary District strongly supports this appeal process, claiming that it has been unable to get a satisfactory response from the Agency as to why it has been placed on restricted status. In any such proceeding brought under this sub-paragraph the Petitioner will bear the burden of proof. A number of variances are usually filed with the Board from individuals living in "restricted status" communities. (Recent cases from Springfield may be found at

13 PCB 193, 14 PCB 423, 14 PCB 723 and 18 PCB 18.) The appeal process allowed here, if it results in Board determination that additional connections may be permitted, will have the added benefit of eliminating many of these petitions as unnecessary, thus conserving Board resources for other matters. Furthermore, it is not anticipated that such appeals would be taken lightly, since the process would probably satisfy the hearing and notice requirements of Section 33(c) of the Environmental Protection Act. Thus, if the situation warranted it, a possible consequence of such an appeal would be imposition of a Board-imposed sewer ban which would affect all sources, including those which do not need Agency permits. Finally, this appeal process is not intended to preclude the present right of individuals to appeal an Agency denial of a connection permit or to seek a variance from the permit requirements pursuant to Parts IV and V of the Procedural Rules.

(f) Effective Date. The effective date of the regulation is set as January 1, 1976, in order to allow the Agency time to implement the publication requirements.

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

Mr. Young abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion was adopted on the 30th day of October, 1975 by a vote of 3-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board