ILLINOIS POLLUTION CONTROL BOARD
June 27, 1972

GODFREY TOWNSHIP UTILITY BOARD	)	
	)	
v.	)	#72-68
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
ROBERT W. GRAHAM	)	
	)	
v.	)	#72-154
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
LEWIS & CLARK COMMUNITY COLLEGE	)	
	)	
v.	)	#72-246
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Ronald C. Mottaz for Godfrey Township Utility Board
James T. Mohan for Robert W. Graham
Thomas Immel, Assistant Attorney General for the Environmental Protectic
Agency
R.O. Birkhimer for Lewis & Clark Community College
OPINION OF THE BOARD (BY MR. CURRIE):

Following our request for additional information in an order entered March 11, 1972, Godfrey Township Utility Board ("Godfrey") filed an amended variance request (#72-68) seeking until February, 1974 to comply with standards respecting discharges from five sewage treatment lagoons in Madison County and asking permission to connect a number of additional waste sources to sewers tributary to the lagoons in the meantime. A hearing was held, and the requirement that we decide the case within 90 days was expressly waived on the record in order to give us time to consider the merits (R. 158-59). The Graham (#72-154) and Lewis and Clark College (#72-246) petitions request relief on behalf of persons seeking to discharge sewage into the Godfrey system. A hearing was held in Graham; the College petition was recently filed.

On June 10, 1965, following investigation of an extensive fish kill on Warren Levis Lake, the Sanitary Water Board wrote to Godfrey indicating that its Warren Levis lagoon was overloaded by 25% beyond design capacity and stating that the SWB would be "reluctant to issue additional permits to install and operate sewer system extensions in the Warren Levis Sewer District" (EPA Ex. 1). On May 25, 1967, the SWB after a further inspection (prompted by the desire of developers to make

additional sewer connections) observed that "one of the two aqualators was not functioning" at Warren Levis; that the first cell "showed an appreciable amount of floating septic sludge, the formation of gas and other evidences of an overloaded lagoon"; that the dissolved oxygen in the effluent was "nearly depleted"; that the effluent BOD was two hundred parts per million, said to be"250% of the then acceptable level"; and that the SWB had "no alternative but to refuse issuance of permits for sewer extensions tributary to the Warren Levis lagoon until such time as additional treatment is provided." (EPA Ex. 2). An SWB letter of July 18, 1969 extended the sewer extension ban to the Monticello lagoon, noting that it had been extended to the Black Creek lagoon earlier the same year, on the ground that both had reached or exceeded their capacity (EPA Ex. 3). On September 24, 1969 the SWB indicated that the situation with respect to the three named lagoons "may become critical in the near future" and asked Godfrey to "limit further connection to each of the subject areas," adding that permits would in the future have to be obtained for connecting buildings housing 15 persons or more or from which a flow over 1500 gallons per day was expected." (EPA Ex. 4). This last letter had the effect of extending scrutiny to include buildings to be connected to existing sewer lines, while the earlier EPA prohibition had applied only to the construction of new sewer extensions.

Godfrey hired consulting engineers in late 1966, with the initial task of solving the problem of Warren Levis lagoon (R. 111-12). Recognizing that "there were more problems in the Township than just that lagoon," the engineers proceeded with a "master plan" for sewage collection and treatment, which first contemplated a single primary treatment plant to discharge to the Mississippi River (R. 112-13). The Sanitary Water Board then having required secondary treatment for discharges to the Mississippi, the plan was revised to provide a secondary plant to treat the wastes now discharged to three of the five lagoons--Warren Levis, Monticello, and Youngblood--, and to provide for interceptors to carry the flow now going to the other lagoons--Black Creek and Coal Branch--to the City of Alton's treatment plant. All the lagoons are to be abandoned except Warren Levis, which is to serve as a holding basin in connection with the secondary plant (R. 113, 144). The variance petition alleged that final plans for the plant would be submitted to the Agency by April 1, 1972, with construction to start September 11, 1972, and operation by February 11, 1974, all contingent upon federal and state financial assistance. At the date of hearing,(May 30), however, plans had still not been completed; they were expected to be within the next "ten to twenty days" (R. 116), with construction and operation schedules not expected to be affected (R. 118). Permits for the facilities needed to transport wastes to Alton have been received (R. 115), but as of the date of hearing Alton had not agreed to accept the wastes. A letter

dated June 16, 1972 from an interested citizen who participated in the hearing states that Alton's City Council has approved the acceptance of Godfrey's wastes but that a legal dispute relative to the effect of annexation on the Godfrey Fire District was holding up execution of the agreement. Construction of the interceptors to Alton is expected to take nine months (see amended petition). The estimated cost of the whole project is $3,200,000,of which Godfrey is contemplating about $2,000,000 (and possibly another $500,000) will be provided by federal and state grants (R. 119-20).

On the assumption that Alton will provide adequate treatment to those of Godfrey's wastes which it is expected to accept, the completion of the above program would result in compliance with applicable effluent standards so far as the record discloses. Moreover, there is no evidence to indicate that, at this late date, the completion date of February 1974, which allows about 18 months for construction, could be improved upon. But there are disturbing gaps in the program even now. First, we do not know whether Alton will accept the additional waste. Second, we do not know whether Alton is in a position to treat that waste adequately. It is no answer to Godfrey's problem to ship wastes to Alton unless they can be adequately treated there. Third, there appears to be some uncertainty still as to whether Godfrey is going to proceed with the project, as the petition makes everything contingent upon someone else's footing a large part of the bill. The record does not dispel this doubt. Fourth, Godfrey's almost total rejection of any attempt at interim improvements because they would reduce the sources of revenue for the long-term project (R. 121-22; Petitioner's Ex. D) suggests that the situation is not going to improve until the interceptors and treatment plant are finished, in contrast to cases in which relief has been granted on the basis of interim improvements (North Shore Sanitary District v. EPA, #71-343 (March 2, 1972); Danville Sanitary District v. EPA, #71-28 (May 26, 1972): Metropolitan Sanitary District v. EPA, #71-166 (Sept. 16, 1971) Orland Park . Finally, the entire situation seems to have become fluid in light of Godfrey's request, since the hearing, for an additional sixty days in which to study an alternative proposal for tertiary treatment (Public Ex. 4) put forward by interested citizens (see letter of Marjory M. Nelson, June 16, 1972). The sum of these deficiencies is that we do not find adequate assurance that the problem will be licked by February 1974 or that it will be reduced as much as practicable in the meantime. A satisfactory program is a requisite for extension of a compliance date, see Mt. Carmel Public Utility Co. v. EPA, #71-15 (April 14, 1971); York Center Community Coop. v. EPA, #72-7 (Jan. 17, 1972); Flintkote Co. v. EPA, #71-68 (Nov. 11, 1971); Metropolitan Sanitary District v. EPA, #71-183 (Nov. 11, 1971).

Moreover, the time for commitment to a program of improvement was some time ago. The inadequacy of the Warren Levis

lagoon was formally pointed out seven years ago. Sanitary Water Board Rules and Regulations SWB-14, adopted several years ago, required facilities to be constructed by July 1972 to meet effluent standards prescribing no less than secondary treatment and disinfection. As EPA observes in its recommendation, Godfrey does not meet those standards now and will not in July (see also the several EPA exhibits indicating the quality of effluent from the several lagoons). No real effort was made to excuse the loss of over a year and a half in meeting the standards. We see no justification for the delay in the record. As we held in Decatur Sanitary District v. EPA, #71-37 (March 22, 1971):

> One cannot qualify for a variance simply by ignoring the timetable and starting late. While compliance within the remaining time may be impossible, any hardship suffered as a result is, so far as is alleged, due to the District's own inaction. To allow a variance on the basis of the present allegations would establish the preposterous proposition that the very existence of a violation is a ground for excusing it.

We cannot give Godfrey a shield against penalties for continuing to pollute for a year and a half beyond the regulation deadline on the basis of the present record. Insofar as the petition seeks approval of the 1974 date for compliance it must be denied.

The remaining questions concern the extent to which new waste sources may be connected to the already overloaded lagoons. As already recited, the Agency indicated in 1965 that it would be reluctant to permit further sewer extensions; banned extensions tributary to Warren Levis in 1967 and to Monticello and Black Creek in 1969; and asked Godfrey to limit connections to existing sewers serving those three lagoons later in 1969. The principle underlying the Agency's actions is clear and correct: Overloaded sewage treatment plants do not give adequate treatment, and additional loads make the situation worse. See League of Women Voters v. North Shore Sanitary District, #70-7 (March 31, 1971). We have allowed exceptions to connection bans on the basis of hardship in certain situations whose applicability to the several distinct categories of connections sought in the present cases is considered below.

In the North Shore Sanitary District case the sewer connection ban was imposed by this Board after an enforcement hearing. In today's cases the petitioners seek relief from a connection ban imposed by the Agency in the exercise of its permit powers. The issue before us is, however, the same: whether the prohibition on connections imposes an arbitrary or unreasonable hardship in light of the particular facts. Relevant facts include the need for the facility sought to be connected, expenditures made in reliance on the ability to

connect, possible health hazards that a connection would eliminate, and the seriousness of the additional pollution that would be caused if a connection were made. This last factor is substantially affected by interim treatment improvements, and by how long inadequate treatment is expected to continue, In today's cases we have essentially no information as to the present condition of the receiving streams or as to the additional adverse effect of further connections. We therefore resolve the present cases on the basis of precedents concerning other waters, for lack of better evidence as to the harm that connections would cause. The burden of proof that on balance the burden of compliance is unreasonable is on the petitioners. More specific proof may be presented if further proceedings are brought.

The strongest case for allowing a connection is that of the nursing home, presented in #72-154, Graham v. EPA. The stipulated facts establish that construction of the home was begun in August, 1969, before the Agency had extended its concern to reach connections to existing sewers, as is the case here. Considerable expenditures were made in reliance on the ability to connect before the ban was imposed. Moreover, a letter from the state Department of Public Health attests to the necessity for additional nursing home beds in the area (Ex. H to petition, #72-154). The hardships of good faith construction prior to imposition of the connection ban and of the need for a quasi-medical facility bring the Graham case within the precedents of Wachta v. EPA, #71-380 (March 7, 1972), in the absence of any showing that the connection will bring about a serious worsening of the situation. The variance in #72-154 must be granted, as the Agency agrees.

Godfrey asks that connections be allowed for "all lots within the existing sewerage systems where a connection contract has heretofore been entered into." The Agency concurs in this request only to the extent that "contracts for home construction on said lots have been executed or construction has commenced" (recommendation, p.4). We agree with the Agency that the Township's promise to provide sewer service is insufficient to create the kind of reliance interest necessary to justify additional pollution. We view the connection contract as roughly equivalent to a connection permit, which we held insufficient in the Wachta case, noted above. Nor do we think the mere entry into a contract to construct a building constitutes the sort of irreparable change of position that is required, Wagnon v. EPA, #71-85 (July 26, 1971). We add that individual petitions will be resolved on the basis of individual hardships proved;from this record we cannot tell that additional steps in reliance on the ability to connect have been taken. The start of construction in the good faith belief that connection will be permitted is sufficient, as held in Wachta. Construction must have begun as of the date the ban was imposed, but we do not read the Agency's letter of September 24, 1969, as imposing a flat ban on additional connections to existing sewere. That letter stated that permits would be required for larger construction

and requested--rather than ordered--that connections to existing sewers be "limited." People starting to build after that, if they already had connection contracts, would so far as the record shows have had no reason to make further inquiry of Godfrey as to whether they could connect, and no Agency permit was required if the building was to serve fewer than 15 persons. We think the good faith start of construction prior to today's order constitutes sufficient change of position in reliance upon the ability to connect so that denial of a connection would impose an arbitrary or unreasonable hardship.

The further request for permission to connect to existing sewer lines even in the absence of contracts to connect must be denied. These cases have even less to support them than those denied above. The argument is made that additional connections should be allowed in order to help raise money for the improvement project. We rejected a similar argument in City of Silvis v. EPA, #72-141 (June 14, 1972), and we reject the present argument. The situation should not be permitted to get worse before it gets better. There is inadequate proof that the project cannot be financed without allowing additional pollution, and if that were the case the answer might be to procure adequate money-raising powers for the Utility Board, or to send all the sewage to a municipality with adequate powers, not to pollute. We would be in a better position to evaluate the financial issue if a further petition, with specific figures, were submittd committing Godfrey to a more specific program.

The final request is to connect a college, a high school, and an existing subdivision to the Godfrey lagoons. It is clear that to do so would worsen the already unsatisfactory effluent. It is also clear that at present the wastes from both the college and the subdivision are inadequately treated in small local plants. We have allowed connections to overloaded plants to eliminate specific health hazards from poorly functioning septic tanks, see City of Silvis v. EPA, #72-141 (June 14, 1972), upon proof that was the lesser of two evils. There is no such proof in the present record; we simply cannot tell whether it would be worse to stick with the present poor plants or to impose further overloads on Godfrey. As for the high school, we know nothing about its present waste disposal at all. We cannot grant a variance without further proof on these issues. The college has recently filed a variance petition of its own (#71-246), seeking relief from its applicable deadline for improved treatment on the ground that ultimate connection to Godfrey is the best answer to its disposal problem. We have authorized a hearing on this petition, and the question of immediate connection can be explored in that proceeding. Other parties similarly situated are invited to intervene.

The hearing officer allowed until June 30 for comments by the parties and interested citizens on the alternative proposal for tertiary treatment noted above. Godfrey has since asked for another 60 days. Having examined the record, we see no reason for our decision to be further postponed, since it is not clear that anything such comments may reveal would affect our decision on any of the issues presently before us, and since there is need to allow certain connections now and to inform the parties of our views in order to avoid further delay. If any party at a later date wishes us to give further consideration to these or other matters, a new proceeding may be filed. We trust Godfrey will move with all expedition to eliminate the present unsatisfactory situation.

Mr. Kissell concurs except that he would allow connections for those with connections contracts who have entered contracts for construction. He and Mr. Aldrich will file separate opinions.

ORDER

#72-68: The request for variance is hereby granted to the extent that waste sources under construction as of June 27, 1972 on lots covered by existing sewer connection contracts may be connected to existing sewers tributary to Godfrey Township lagoons, and in all other respects the variance is hereby denied.

#72-154: The request for variance is hereby granted

#72-246: A hearing will be held.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 27th day of June, 1972, by a vote of 4-1.

Christan L. Moffett