

Although none of the pleadings submitted by Petitioners so state, it is plain that the relief sought here is variance from Rule 962 of the Water Pollution Regulations, which prohibits the Agency from issuing permits for the construction or operation of wastewater sources or sewers where such source or sewer would cause or contribute to violation of the Act or other portions of the Water Pollution Regulations. PCB Regs., Ch. 3: Water Pollution. Petitioner seeks to construct and operate a Denny's Restaurant, which will result in a load upon the Wheaton Sanitary District sewage treatment plant (STP) of approximately 80 population equivalents (PE). The Agency has had the Wheaton STP on critical review since 1972, based on its findings that the plant could not meet applicable effluent limitations.

Petitioners based their case for Variance on four major points:

1. The proposed restaurant will have a very slight impact on the STP effluent, if any; the very low PE load generated will in fact be reduced by the installation of a grease trap or, if necessary, holding tanks.

2. The Wheaton STP is a "borderline" case and usually approaches the applicable effluent limitations, when the limitations are not in fact met.

3. The Wheaton STP has now been approved and funded for major expansion. Construction on major expansion which will provide more than sufficient capacity is expected to start in January, 1976, with completion scheduled within 600 days thereafter. It is also expected that ongoing construction will provide significant additional capacity at the STP within 400 days, or by early 1977. Petitioners' restaurant project will not be completed before fall of 1976, if the requested variance is granted (R.68).

4. As a result of representations made by an employee of the Respondent Agency, it is estopped from denying Petitioner a permit for construction and operation of its restaurant as a wastewater source. Specifically, as a result of statements made by an Agency Official to Petitioner DeJong in the Chicago office of the Agency, to the effect that the Wheaton STP would imminently be granted 5,000 additional PE in permit issuing authority, which statements Petitioners relied on, Petitioner DeJong expended in excess of \$29,000 on improvements to the site of the proposed restaurant, including grading and installation of a sewer connection.

Petitioners have shown considerable hardship which may result if the Variance is not granted, and have adequately borne their burden of showing that the environmental harm likely to result from the grant of the Variance is in comparison very small.

While we agree with the Agency that Petitioners' claim that the restaurant should be allowed in this instance because its discharge will have no measurable effect on the STP effluent is not sufficient to allow the grant, we also agree with the Petitioners that the restaurant's impact will be slight. Petitioners' claim of "no measurable effect" is fallacious. As the Board has held in analagous cases, if the STP is violating effluent standards, any additional load will contribute to such violation. See, e.g., Cohn v. EPA, PCB 75-102, 17 PCB 321 (1975), and cases cited. But the Board has also held that where the additional load is small, and the period of time short, a sufficient showing of hardship will allow the grant of a Variance from a "Sewer Ban." See, e.g., Nixon v. EPA, PCB 75-354 (October, 1975); Hawthorne Lodge v. EPA, PCB 75-297 (Oct. 16, 1975); Macoupin v. EPA, PCB 75-273 (Oct. 9, 1975).

The Agency witness at the second hearing agreed with Petitioners' contention that the Wheaton STP is a "borderline" case, and that it usually meets or exceeds the applicable standards for its effluent, (R.73). The Agency also agreed that the quality of effluent from the Wheaton STP often exceeds the water quality in the receiving stream upstream of the discharge, (R.70, 71). While the record is not entirely clear as to the efficacy of the grease trap to be used by Petitioners, it is clear that this will have some effect in reducing the amount of contaminants generated by the restaurant, (R.38,48,62-65). In addition, Petitioners have agreed that, if necessary, they will construct holding tanks for the restaurant, and discharge to the Wheaton Sanitary District's sewers (and therefore to the STP) only during off-peak-load hours, (R.65,66).

These facts do lead to the conclusion that the additional load placed on the "borderline" plant will indeed be small. That conclusion, taken with the uncontroverted testimony by a representative of the Wheaton Sanitary District that the STP is now beginning a major expansion, increasing the plant capacity from 53,000 PE to 89,000 PE, (R. 17) within the next 600 days, (R.46-48), lead to the conclusion that the additional load which Petitioners' restaurant will add to the existing problems with the STP effluent will be both minute and short-lived. In addition, it is expected that many customers using the restaurant will be from nearby apartments also tributary to the Wheaton STP, (R.33). In essence, the environmental damage which might be caused by the grant of the Variance is minimal.

That minimal environmental damage is then measured against the considerable hardship which would result to Petitioners if the Variance is denied. While the necessity of foregoing the use of land in this situation is, in itself, insufficient, (See, e.g., Weinstein, et al. v. EPA, PCB 71-107, 122, 192, 2 PCB (1971.)), the situation here is readily distinguished. Petitioners here stand the risk of losing financing commitment for the restaurant project, (R.42), and have foregone the use of permits to construct much larger projects, with a PE of up to 2,000, in order to continue with the restaurant project, (Stip. p.4). While we need not decide whether the principle of estoppel would be sufficient here alone as grounds for the Variance, we do find that statements by the Agency that the Wheaton STP would be allowed a considerable number of additional PE has added considerably to Petitioners' hardship.

In granting this Variance, we shall set a condition which may require that Petitioners fulfill their offer to construct holding tanks for the restaurant. Based on Petitioners' estimate that the restaurant will be completed in Fall, 1976, and the Wheaton Sanitary District's estimate that considerable additional capacity may be available within 400 days, (R.47), we feel that it would serve no purpose to impose a holding tank requirement as an absolute condition. Instead, we shall require that the Agency evaluate the progress on the Wheaton STP in September, 1976, and if in the Agency's judgment sufficient additional capacity to handle the load generated by Petitioners' restaurant will not be available by July 1, 1977, Petitioners shall, as they offered at the hearing, (R.65), construct suitable holding tanks to the Agency's specifications. This condition will, we feel, prevent the restaurant from adding to the STP's violations of the applicable effluent standards for any unreasonable period.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that Petitioners, American National Bank and Alvin W. DeJong, be granted a Variance from Rule 962 of Chapter 3: Water Pollution, of the Pollution Control Board's Rules and Regulations, to construct and operate as a wastewater source a "Denny's Restaurant" as described in the foregoing Opinion, subject to the following conditions:

1. Petitioners shall, by September 1, 1976, obtain and forward to the Environmental Protection Agency a summary report on the progress of the Wheaton Sanitary District Sewage Treatment Plan expansion project. If, in the opinion of the Environmental Protection Agency said project will not provide sufficient capacity by July 1, 1977, such that Petitioners' restaurant will add to any violations of this Board's Rules and Regulations, Petitioners shall, by November 1, 1976, construct suitable holding tanks for the wastewater from said restaurant, such holding tanks to meet such specifications as the Environmental Protection Agency may require; the Board retains jurisdiction in this matter until November 1, 1976.

Petitioners, American National Bank and Alvin W. DeJong, shall, within thirty (30) days of the date of this Order, execute and forward to the Environmental Protection Agency, Control Program Coordinator, 2200 Churchill Road, Springfield, Illinois 62706, a certificate of acceptance in the following form:

I, (We), _____ having read the Order of the Illinois Pollution Control Board in case No. PCB 75-75, understand and accept said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

SIGNED

TITLE

DATE

Mr. James Young abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 14th day of January, 1976 by a vote of 3-0.


Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board