ILLINOIS POLLUTION CONTROL BOARD
July 25, 1972

CONGREGATION AM ECHOD	)	
	)	
	)	
v.	)	# 72-202
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Dissenting Opinion (by Mr. Currie):

Am Echod sought a variance from our prohibition of new sewer connections tributary to overloaded treatment plants in the North Shore Sanitary District (League of Women Voters v. EPA, #70-7, March 31, 1971), asking to connect a one-family residence to a Waukegan sewer. We dismissed the petition as moot on the ground that we had allowed the District to grant additional connections on the basis of treatment plant improvements. North Shore Sanitary District v. EPA, #71-343, March 2, 1972; Congregation Am Echod v. EPA, #72-11, April 4, 1972. A second petition was then filed, alleging that the District could not allow the connection because the sewer transporting wastes to the treatment plant was itself overloaded. The Agency recommended that the variance be granted because of hardship but affirmed that the sewer was overloaded.

We ordered the parties to submit more information:

> It is our responsibility to balance the hardships of a variance denial against the harm that would occur if the variance were granted. We cannot intelligently do so on the present record, for we do not know the effect of adding the wastes in question to an already overloaded sewer. If, for example, the variance would mean raw sewage in somebody's basement, a very great hardship indeed would be required to justify a grant. We therefore postpone decision pending receipt of additional information from the parties as to the adverse effects of allowing the connection sought.

The petitioner's response was that it was the Agency that had originally designated the sewer as inadequate, for reasons undisclosed; that the Agency apparently considered the effect of an additional connection de minimis, since it had recommended a grant of the variance; and that consultations with City officials

led to the conclusion that there was adequate capacity during dry weather but that storm water infiltration caused overflows to occur "when there is an exceptionally heavy rain." The Agency disagrees with the assessment of an added connection as de minimis but adheres to its recommendation that the variance be granted because the alleged hardship is "unique and severe." The Agency gives us no facts as to the effect of the proposed connection, saying only in general terms that

> sewers designated as inadequate to transport additional wastewater were so classified because they are subject to excessive flows from storm water runoff during periods of wet weather. These excessive flows result in illegal bypassing of untreated wastes into the waters of the state and/or sewer backups sending untreated wastes into the homes of various individuals. . . . Any connections to these inadequate sewers should be closely scrutinized and limited since the number of such connections to these sewers is bound to make the situation worse for individuals already adversely affected during periods of wet weather.

The alleged hardship if the connection is refused, which is not disputed, is that the Congregation's rabbi, who now lives a mile from the temple, suffers from a leg disability that makes it difficult for him to walk and for religious reasons will not ride in motor vehicles on the Sabbath. The Congregation has built him a home near the temple and wishes to connect it to the overloaded sewer to relieve his burden and that of his wife, who also finds walking difficult during inclement weather, in getting to and from religious services.

Our task is to balance this hardship, which granting the variance would alleviate, against the harm to others that the grant would cause. The test is a strict one. The statute requires a showing by the petitioner that compliance with the law would impose an "arbitrary or unreasonable hardship," and this Board has variously said that the cost of compliance must be "wholly disproportionate to the benefits" or must "substantially outweigh" them. See, e.g., EPA v. Lindgren Foundry Co., #70-1 (Sept. 25, 1970) (Opinions of Messrs. Currie and Kissel). The statute is clear that the burden of proof is on the petitioner to show the cost of compliance is arbitrary, and this includes the burden of proving the adverse effects of granting the variance would be small in comparison. E.g., Norfolk & Western Ry. v. EPA, #70-41 (March 3, 1971).

In our opinion of June 20 we expressed our concern over the virtually complete lack of information before us as to the adverse effect of granting this requested variance and gave the parties an opportunity to rectify it. Unfortunately, we know essentially no more now than we did then. The Agency has given us its repeated

conclusion that it views the adverse effect of allowing the connection as small in comparison with the hardship of having the rabbi and his wife continue to walk the mile to and from the temple. We value the Agency's advice, as we are directed to do under the statute, but the decision is for us to make, and we cannot make it without the facts. No one told us what will actually happen if an extra 300 gallons of waste per day, as alleged in the petition, are put into this overloaded sewer at times of heavy rain. If present conditions are such that a two-inch storm falls 200 gallons short of putting raw sewage into someone's basement, then making this connection would mean that in such a storm there would be 100 gallons of sewage in that basement that otherwise would not be there. Nothing in the papers before us in any way rules out this possibility. Since the burden is on the petitioner to prove its case, and since there is no evidence to the contrary, we must assume that the connection would mean sewage in otherwise clean homes. And that, I think, is a prospect we cannot view with anything less than horror. I cannot say it is clearly preferable to put raw sewage in some innocent person's home than to have a man with a bad leg walk to work and back on days when his religion counsels him not to ride.

No mention has been made by the parties of the twin constitutional provisions protecting freedom of religion and forbidding the establishment of religion. Even after rereading the Supreme Court's most recent explication of these clauses, which appears to require special privileges for persons with religious restrictions in certain narrow circumstances Wisconsin v. Yoder, 92 Sup. Ct. 1526 (1972), I cannot believe that freedom of religion goes so far as to include the right to injure innocent people by putting raw sewage into their homes.

Much public attention has been focused on the problem of sewage treatment, and we have repeatedly stressed in our decisisons the paramount importance of assuring that sewage treatment plants are upgraded to provide the necessary degree of treatment. See, e.g., In re Water Quality Standards Revisions, #R 71-14 (March 7, 1972); League of Women Voters v. North Shore Sanitary District, supra. The present case, however, brings to light a problem of potentially equal importance that has not been so prominently in the public mind. It does little good to build exotic facilities to treat sewage if the sewers are too small to take the sewage there to be treated. Wastes discharged to an overloaded sewer, as the Agency tells us in its supplemental recommendation in the present case, overflow untreated into a stream, or are backed into someone's home, or, as we saw in an earlier case (School Building Commission v. EPA, #71-247 (Oct. 18, 1971)), into the streets. The public health risks of such a situation are obviously intolerable and inexcusable. The answer to the problem of overloaded sewers is not to grant variances allowing the problem to get worse; it is to build decent sewers as fast as is humanly possible. It is imperative that public pressure, as well as the pressure of refusing additional connections, be brought with all strength to

bear upon those municipalities and other governments responsible for inadequate sewers in order to eliminate this disgraceful situation.

I believe the variance should be denied.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that Mr. Currie submitted the above dissenting Opinion this 25 day of July, 1972.

Christan L. Moffett