ILLINOIS POLLUTION CONTROL BOARD
December 15, 1983

UNITY VENTURES, Petitioner,	)	
v.	)	PCB 80-175
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND COUNTY OF DUPAGE, Respondents.	)	

RICHARD J. KISSEL & ROY M. HARSCH (MARTIN, CRAIG, CHESTER, & SONNENSCHEIN), APPEARED ON HEHALF OF PETITIONER;

JUDITH A. GOODIE & THOMAS R. CHIOLA, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

ALVIN G. SCHUERING, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF DUPAGE.

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

PROCEDURAL HISTORY

The Original Petition & Appeal

This matter comes before the Board on the petition for variance filed by Unity Ventures (Unity) October 9, 1980, as amended January 17, 1983. 35 Ill. Adm. Code 309.242(a) [formerly Rule 963(a) of Chapter 3: Water Pollution]. This rule, in summary, provides that sewer construction permits expire two years after issuance.* The purpose of the variance is to extend the life of a sewer construction permit issued by

---

* The complete text of the rule is as follows:

"Construction permits for sewers and wastewater sources shall require that construction be completed within two years. Construction permits for treatment works and pretreatment works shall require that construction be completed within three years. In situations where the magnitude and complexity of the project require it, the Agency may issue a construction permit, requiring completion within a period not to exceed five years."

the Illinois Environmental Protection Agency (Agency) January 31, 1979, which would have expired by its terms January 31, 1981.

The sewer would serve the proposed Hobson Greene Unit 2 real estate development project, which is to be constructed on a 58.9 acre parcel of land located at the northwest corner of 75th Street & Greene Road in Lisle Township, DuPage County. The proposed development would consist of 78 single family dwelling units and 22 multiple family dwelling units, which would generate an average 239,200 gallons per day (gpd) of sewage, or 2,392 population equivalents (P.E.). Title to the proposed sanitary sewer extension at issue, once constructed, would lie with the DuPage County Department of Public Works (County). Flows from this sewer extension would be tributary to the County's Lisle-Woodridge Sewage Treatment Plant (STP).

The Lisle-Woodridge STP has been on restricted status since May 31, 1979, due to hydraulic overloading and violation of various permit conditions. This resulted in the filing of an action in the Du Page County Circuit Court entitled Corporate West Development v. IEPA, et al., No. 79 MR 257.* A counterclaim for sewage related violations of the Act was filed by the Agency against the County of DuPage, and the Village's of Lisle and Woodridge. Pursuant to stipulation, on August 13, 1980 Judge Teschner issued an Order granting partial summary judgment to the Agency.

Upon entering the order the court, made various findings including:

a) The Woodridge-Lisle plant was hydraulically overloaded and in violation of its permit conditions;

b) new treatment plant capacity was needed;

c) additional loading to the overloaded plant absent some control would result in a threat to public health and welfare by adding pollutants to the waters of the State and aggravating existing overflows of raw sewage.

The court ordered specific actions to be taken in an attempt to alleviate the situation including:

---

* What scanty history there is on the original complaint and counterclaim in this action is contained in pleadings and depositions from 79MR257, which were attached by the Agency as exhibits to its June 4, 1982 Motion for Order for Additional Information in this action.

a) construction of additional sewage treatment capacity;

b) construction of a stormwater bypass system to alleviate pressure during heavy rains;

c) maintenance and repair work on the existing treatment facilities;

d) adoption of a sludge management program;

e) study of infiltration/inflow problems.

The part of the court's order which is most pertinent to Unity Ventures' claim is the allocation system which the court set up for connections to the overloaded plant. This allocatior system provides for staged addition of connections to the overloaded plant based upon performance of the plant as represented by discharges to the waters of the State. This order contemplated and provided for additional connections by all those holding sewer permits from the Agency for addition to the Woodridge-Lisle facilities. The allocation system was to have a limited life since additional treatment capacity was to be added to the Woodridge plant by the end of 1983. The additional plant capacity is to be provided by the Green Valley plant.

Unity entered the Corporate West case as an intervening complainant on October 10, 1980, seeking in part a declaratory judgment that the August 13, 1980 Order did not affect Unity's ability to utilize the January 31, 1979 2,392 P.E. permit relating to Hobson's Greene Unit No. 2. (While that permit was included in the court's overall flow calculations, Unity had not been a party to the stipulation creating the Order.) As of the time of Unity's briefing of this matter, it would appear that Judge Teschner has not ruled on Unity's request (see Unity Reply Brief of September 15, 1983, at p.2-3).

As of the filing of its original October 9, 1980 petition, Unity had not begun construction of the Hobson's Greene Unit 2 development pursuant to its January 31, 1979 permit,* and presented no proposed construction timetable.

Unity asserted that construction had been delayed "because of the slowdown in demand for residential housing and the uncertainties surrounding the Lisle-Woodridge Sewage Treatment Plant involving multiple litigation" (Pet.¶9).

---

* Construction had been completed on Hobson's Greene Unit 1, a 35 single family dwellings development immediately north of Unit 2, pursuant to a February, 1979 permit. A third phase, Unit 3, is also planned, to consist of 121 single family dwelling units and 480 multiple family units. The Units 1 and 3 developments are not here at issue.

Variance was sought for a 5 year period to allow for construction of the sewer at some time after completion of the Green Valley plant.

On December 19, 1980, a majority of the Board voted to dismiss the petition as inadequate pursuant to 35 Ill. Adm. Code 104.125 (formerly Rule 401(b) of Chapter 1, Procedural Rules), upon motion by the Agency. The majority Order found that the petition "lacked a sufficient allegation of hardship", and that it alleged uncertainty as to whether [Unity] might construct the sewers at all." Leave to refile the petition was, however, granted.

Unity appealed the dismissal. The Appellate Court for the Second District reversed the dismissal in a non-published decision pursuant to Supreme Court Rule 23 in Unity Ventures v. IEPA et al., No. 81-59, February 2, 1982. The Court ruled that the Agency's motion to dismiss constituted an objection to the grant of variance such as to trigger a mandatory hearing pursuant to Section 37 of the Environmental Protection Act, therefore finding the Board's pre-hearing dismissal of the action improper (slip op. at p.3). The Board received the remand mandate of the Appellate Court on May 28, 1982, and reinstated the case and directed that hearing be set by Order of June 10, 1982.

Discovery and Sanctions

On June 4, 1982 the Agency asked the Board to order Unity to provide additional information concerning the legal entity which is the petitioner in this case. On June 11, 1982 the Agency filed its initial discovery including interrogatories and requests to produce. The discovery requests sought information to support statements in the Petition, including information about Unity's development plans, the ownership of the property to be developed, the holder of the permit for which an extension was requested, and the expenditure of funds for development, improvement and other costs. The Agency also asked for admissions of fact and genuineness of documents on June 11, 1982. In its July 1, 1982 Order, the Board noted that the information which the Agency sought concerning the holder of the permit should be forthcoming in discovery. Therefore, the Board denied the Agency's June 4, 1982 request.

Following five requests by Unity for extensions of time to respond to the Agency's interrogatories and requests to produce (see the Board's Order of December 2, 1982 and the Agency's September 21, 1982 Motion in Opposition to Request for Additional Time), the Board on October 5, 1982 ordered Unity to respond by October 12, 1982. Unity's response on October 12, 1982 was to move to strike the Agency's interrogatories as burdensome and because the information was

available from some unspecified "alternative means." Unity also moved to strike the document requests on grounds of relevancy.

In its order of November 12, 1982 the Board noted that during the four months following the discovery requests, Unity had not raised an objection to the discovery. The Board also noted that the petitioner presumably would be the one to provide information on its identity, on funds expended on the project and on the entities expending such funds. The Board assumed that this information would be forthcoming from Unity and found it to be relevant to the proof of arbitrary or unreasonable hardship. The Board ordered responses from Unity by November 19, 1982 and warned Unity that sanctions would result if Unity failed to respond. Unity did not answer the Agency's discovery requests as ordered.

On December 2, 1982, the Board entered sanctions against Unity for its "intentionally dilatorious" conduct. Specifically, those sanctions barred Unity from making claims or introducing evidence on the issues of ownership of the property in question; expenditure of funds for land development and improvement costs as well as other expenses; identity of the holder of the permit which is the subject of the extension request; and plans for development. In addition to precluding introduction of evidence on these matters at hearing, the Order struck information on these issues from the petition.

On December 30, 1982, the Board denied Unity's motion to reconsider the December 2 sanctions Order. Unity was, however, given leave to file an amended petition.

Unity filed its amended petition January 17, 1983. The amendment was virtually identical to the October, 1980 petition, and contained the material stricken December 2. However, the petitions did differ in that the amendment alleged that the "worst case completion date" for the Green Valley plant was October, 1983. The relief requested was also slightly different, in that a two year variance was requested to begin "upon notification by the Agency that construction of the Green Valley plant was complete, or on January 1, 1984, whichever date is earlier" (Am. Pet., ¶9,10).

This amended petition was the subject of a March 1, 1983 motion in limine by the Agency, which contended over Unity's objections, that the December 2 sanctions should apply despite the filing of an amended petition. In its order dated March 24, 1983 the Board said:

> "Unity cannot escape sanctions imposed for cause merely by filing an amended petition. The Board will not allow that which cannot be done directly to be done by indirection."

Upon reconsideration of this unanimous decision, the Board once again reaffirmed the earlier sanctions in an order dated May 5, 1983. In the same order the Board directed the hearing officer to set the hearing on the Amended Petition within a specified time, and prohibited any continuance of the date to be set. This order was based on the Board's acknowledgement of "Unity's history of delay in this case." (Order of May 5, 1983 at p.3).

At this juncture, it should also be noted that the Agency had filed a Recommendation that variance be denied June 28, 1982, and an Amended Recommendation favoring denial on February 14, 1983. The Agency recommended that variance be denied on two basic grounds. The first was that there was no valid permit whose term could be extended, as the permit was issued in January, 1979 to "Unity Ventures", a corporation defunct as of June 21, 1979, and no transfer had been made to the "Unity Ventures" partership which came into existence on June 1, 1979. The second ground was that Unity's petition failed to allege arbitrary or unreasonable hardship. The Agency alternatively requested, however, that if variance were to be granted that sewer construction not begin until the Green-Valley-Woodridge Complex demonstrated ability to comply with its NPDES permit for three consecutive months.

The County adopted the Agency Amended Recommendation as its own on February 17, 1983, adding only an affidavit projecting completion of the Green Valley plant between August and October, 1983.

The Hearing

The hearing on the Amended Petition was held on June 30, 1983. Over objection, Unity presented the testimony of one witness, James Huff, on the issue of the environmental effect of grant of variance. It also presented two exhibits, the application for the permit at issue and the permit itself. Again over objection, Unity presented an offer of proof reiterating the allegations of the amended petition.

Neither the Agency nor the County presented witnesses at hearing, although the Agency presented opening remarks. Pursuant to schedule, the Agency and Unity submitted simultaneous briefs on August 30, 1983, and reply briefs on September 15-16, 1983. The County has not briefed the matter.

THE ISSUES

Pending Motions

In addition to objections preserved in its briefs on August 30, the Agency made separate motions to strike the testimony of James Huff, and to strike Unity's offer of proof. Unity filed responses on September 15.

The basis for the motion to strike the Huff testimony (R.24-38), in essence revolves about unfair surprise, and inadequate opportunity for rebuttal and cross-examination. Unity advised the Agency that it intended to call Mr. Huff as a witness on June 29, 1983, less than 24 hours before the June 30 hearing; the County was never informed (R.14). Unity asserts that the decision to use Mr. Huff as an expert was not made until June 28-29 (Reply at 2). The Agency asserts that it had been attempting to learn the identity of Unity's witness(es) since July 22, 1982, and that as late as June 22, 1983, Unity objected that it was "oppressive and burdensome to ask that the experts be disclosed at this time" (Motion at 2).

In reviewing the hearing record, the Board notes that, under the circumstances, it was inappropriate on the part of the hearing officer to deny the Agency's requests to allow a pre-testimony interview, or a one-half hour recess to enable the Agency to call a technical expert to be present during Huff's 10 minute testimony (R.20, 23-24). Yet the Board also notes that the Agency did not exercise the option offered both by the hearing officer (R.21) and by counsel for Unity (R.38-39) to make the witness available for cross-examination on another day. Thus, while the Board cannot condone Unity's last minute decision or approve the actions of its hearing officer, the Board will accept the Huff testimony.

The Agency has also moved to strike the Unity offer of proof reintroducing into the record information thrice-stricken by the Board in sanctions Orders. This offer was also objected to by the County at hearing (R.46).

The Board finds that the offer of proof was properly accepted, but will not consider the information as evidence. The Board will allow the offer to remain in the record.

Unity has raised two other sanctions-related questions in its brief. Unity reserves and renews its prior arguments that the sanctions Orders of December 2, 1982, March 24, 1983, and May 5, 1983 were "arbitrarily, capriciously, and unlawfully imposed" (Brief at 2). These arguments are rejected for all of the reasons exhaustively detailed in the Orders of those dates.

Finally, Unity has argued that the Agency has somehow "waived" the sanctions Orders by addressing the issues on which Unity had silenced itself by delay (Brief at 2-3). The practical, and ludicrous, effect of acceptance of this argument is to invite variance petitioners to rewrite the Act by 1) withholding information which the Act charges them to give, so as 2) to trigger sanctions on particular issues, so as 3) to prevent the Agency from presenting evidence, so as 4) to prevent the Board from deliberating the full range of issues.

Permit Status and Transferability

Special Condition 7 of the permit issued January 31, 1979 provides that

> "This permit may not be assigned or transferred without a new permit from the Environmental Protection Agency." (Unity Ex. 2, p.2).

The "Unity Ventures" here appearing as a petitioner and claiming to own this permit has admitted that it "was formed pursuant to an agreement of Partnership dated June 1, 1979" (Unity Response to Requests for Admissions of Facts No. 1 and 2). In its Amended Recommendation, the Agency states that

> "This permit was issued to a different legal entity, a corporation, which withdrew from doing business in Illinois on June 21, 1979.***There is no record of any transfer of this permit from the corporation to the petitioner-partnership." (Am. Rev. ¶4)

The Board finds that the permit here at issue, Unity Ex. 2, expired by its own terms on or about June 21, 1979, when the entity to which it was issued ceased to exist. The Board wishes to note that this is not, in its opinion, an issue in which form is elevated over substance. As afore-mentioned, the badly-overloaded Lisle-Woodridge plant was placed on restricted status May 31, 1979. Based on imposition of restricted status, the Board questions whether the Agency would have had legal authority on June 1, 1979 to issue, or to transfer from one "Unity" to the other, the "new" permit specified by Special Condition 7 absent prior grant of a variance by the Board from 35 Ill. Adm. Code 309.241.

Arbitrary or Unreasonable Hardship and Environmental Effect

Even had the Board not concluded that the permit here at issue had not expired long before this action ever reached the Board, based on the evidence here presented, the Board could not find that grant of variance would be justified.

Consistently, but particularly in its reply brief, Unity has characterized this action as one in which no environmental harm would occur if its request were granted, so that hardship need not be proven. The basis for this argument, as explicated by portions of the testimony of James Huff, is that once the Green Valley plant comes on line, about 1.5 mgd will be diverted from the Woodridge plant to Green Valley. The diversion is expected to cause the effluent quality from both the existing Lisle and Woodridge plants to improve. Once the 1.5 mgd is taken out of the Woodridge system, it was stated that introduction of a new wastestream of 240,000 gpd "would not be detrimental--the effluent quality would be better still than it would have been historically" (R.33).

However, this ignores the fact that the Lisle-Woodridge plants have been unable to meet effluent standards, even given their improved performance in the past two years. As the Agency suggests, the Green Valley system can be expected to have an inconsistent performance while the usual, initial "debugging" process occurs. The system is still on restricted status, and will doubtless remain so until both the Woodridge and Green Valley plants are operating properly. Unity has therefore proven that a less adverse environmental effect would occur by a connection after Green Valley is operational than before, but not that none will occur. Hardship therefore must be proven.

Unity has not, in three years, once alleged that it was ready, willing, and able to build Hobson's Greene Unit 2. It has, on the other hand, consistently stated that it had made a business decision not to build during the time period when its purported "permit" was valid, and has resisted revealing any building plans whatsoever. Based on the entire complex and convoluted history of this action, the Board has become convinced that Unity has pursued variance before the Board merely to keep the 1979 permit arguably in effect for speculative purposes.

Unity's proposed 2,392 P.E. was figured into plant capacity under Judge Teschner's Order. Despite Unity's arguments to the contrary, denial of variance does not automatically foreclose Unity's ability to build when and if it has actual plans to proceed. Once Green Valley becomes fully operational and the Woodridge portion of the facility is removed from restricted status, Unity may "get in line" with other prospective developers and apply for a new permit. In the event that Unity wishes to commence construction prior to lifting of restricted status, it may petition for variance from Section 309.241, presenting a construction schedule and proof of hardship.

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

ORDER

Unity Venture's petition for variance from 35 Ill. Adm. Code 309.242(a) is hereby denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 15th day of December, 1983 by a vote of 7 0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board