

PARTNERS

GEORGE M. PLEWS
SUE A. SHADLEY
PETER M. RACHER
CHRISTOPHER J. BRAUN
JEFFREY D. CLAFLIN
FREDERICK D. EMHARDT
LEONARDO D. ROBINSON
S. CURTIS DEVOE
JOHN B. BRIDGE
STEPHEN A. STUDER
JEFFREY A. TOWNSEND
JEFFREY D. FEATHERSTUN
DONNA C. MARRON, PH.D.

— Associates —

JOHN M. KETCHAM
THOMAS A. JOHN
JOHN D. MORIARTY
CAROL S. COMER
ALEXANDRA S. LIPPS
MICHAEL W. SKORUPKA
BRETT E. NELSON
AMY ROMIG

— Of Counsel —

F. RONALDS WALKER
CHRISTINE C.H. PLEWS
MARY ANN F. SAGGESE
JOHN H. LLOYD, IV



PLEWS SHADLEY
RACHER & BRAUN
ATTORNEYS AT LAW

1346 N. Delaware Street • Indianapolis, IN 46202-2415 • Phone: (317) 637-0700 • Fax: (317) 637-0710

53732 Generations Drive • South Bend, IN 46635-1539 • Phone: (219) 273-1010 • Fax: (219) 271-2050

2001 • ISSUE #5

Reasonable Development: Environmental Ruling Rejects Sewer Ban

By John Ketcham and Peter Racher

In the 1800s, transportation limited development. Without roads, canals, and then railroads, the countryside remained empty and development stood still. In the 20th and now the 21st centuries, sewers are a restricting factor. Apartment complexes,

sewage, and industrial wastewater in the same pipe. Most of the time, combined sewer systems transport all of their wastewater to a sewage treatment plant, where the sewage is treated and then discharged to a water body. But during periods of

perspective



Public Radio Underwriting

■ *Plews Shadley Racher & Braun is pleased to be a daily underwriter of the "Morning Edition" on WFYI-FM, the Indianapolis public-radio station. WFYI broadcasts on 90.1 FM.*

subdivisions, shopping centers and new communities are possible only where sewer systems can collect, transfer, and treat domestic wastewater in compliance with the Clean Water Act. Without sewers and up-to-date treatment facilities, development in cities and whole townships stops. New construction is put on hold, property sales slow and values decline, and the whole economy eventually feels the pinch.

Because the vast majority of urban sanitary-sewer systems were designed and installed many decades ago, many communities across the midwestern and eastern United States continue to use combined sewer systems. Combined sewer systems are sewers that are designed to collect rainwater runoff, domestic

heavy rainfall, the wastewater volume in a combined sewer system can exceed the capacity of the sewer system or treatment plant. The wastewater treatment system cannot treat all the combined sewage and storm-water runoff, and the systems have to shed the excess. This results in Combined Sewer Overflow ("CSOs").

For this reason, combined sewer systems are designed to overflow occasionally and discharge excess

— continued page 2

Visit our website:
www.psrb.com



Reasonable Development

— Continued from page 1

wastewater directly into nearby streams, rivers, or other water bodies. These overflows contain not only storm water but also untreated human and industrial waste, toxic materials, and debris. They are a major water-pollution concern for cities that have combined sewer systems. Federal and state law requires that municipalities work to reduce and eliminate CSOs, and that CSOs be identified and listed on municipalities' permits for their waste-water treatment systems issued under the National Pollutant Discharge Elimination System ("NPDES").

Recently, certain citizens and environmental groups have attempted to curtail CSOs through litigation. For example, it has been argued that developers may not hook up to combined sewer systems without first obtaining "offsets" (i.e., a reduction elsewhere in the sewage going into the system) to create capacity in systems plagued by CSOs. No provision in Indiana law explicitly requires such sewer offsets, and enforcing such a rule could severely curtail development activities. In a recent ruling with implications for developers state-wide, the Indiana Office of Environmental Adjudication rejected an attempt to use the CSO issue as a basis for preventing a new

residential development near Fort Wayne from conveying wastewater to the City of Fort Wayne wastewater treatment plant. See *In the Matter of Objection to Issuance of Permit Approval No. 13904, Chestnut Group, Inc.*, Allen County, Cause No. 00-WV-J-2562.



Peter Racher



John Ketcham

These are the background facts: The Indiana Department of Environmental Management ("IDEM") is generally responsible for issuance of construction permits for sewer systems. On April 4, 2000, a Fort Wayne developer applied to IDEM for a permit to construct a sanitary sewer for fifty-four homes in two subdivisions. Neighbors, citing wetlands protection concerns, had previously objected to the developer's plans to erect a private sewage-treatment plant as part of the development. The developer then sought to tie into the Fort Wayne system.

The developer's application for the IDEM construction permit included, as required by IDEM's rules, appropriate sworn certifications from the local sewer district and the City of Fort Wayne that sufficient capacity existed in the city's sewer system to accept and

treat the effluent. The certifications stated, again as required by IDEM's rules, that the daily flow from the new subdivision would not cause overflows in the sewer system. However, the certifications acknowledged that overflows could occur (as is often the case in municipal systems during rainy weather) at specific discharge points (the CSOs) that were allowed under the City of Fort Wayne's NPDES permit. On July 26, 2000, IDEM issued the construction permit.

The neighbors of the new subdivision then filed a petition with the Office of Environmental Adjudication asking that the permit be overturned. The Office of Environmental Adjudication is an administrative body that hears appeals regarding permits issued by IDEM. The neighbors objected primarily that the effluent, averaging less than 17,000 gallons per day, would cause or contribute to CSOs in the City of Fort

Wayne's system. Plews Shadley Racher & Braun represented the developer against the petition for administrative review.

The City of Fort Wayne, like more than 100 communities throughout Indiana,

has a combined sewer system dating back as long as 100 years ago. Fort Wayne's NPDES permit allows CSOs from specific listed locations. Fort Wayne's system treats on average 50

— continued page 3

Many cities continue to use combined sewer systems.



Reasonable Development

— Continued from page 2

million gallons of sewage per day. The system is designed to treat 60 million gallons per day and, during storms, can treat as much as 72 million gallons per day. Nevertheless, the petitioners contended that the City of Fort Wayne had improperly certified it had capacity to handle any additional effluent because the sewer system had overflows during wet weather. The petitioners argued that any addition to a system with combined sewer overflows would, by definition, contribute to the CSOs and violate the law. The only solution, they contended, would be offsets or holding the effluent until after a storm. If neither of those could be done, petitioners maintained that IDEM could not issue the permit.

On May 4, 2001, the Environmental Law Judge, Wayne Penrod, issued a fifty-five page decision rejecting petitioners' contentions. Petitioners' primary contention was that the capacity of a system should be determined not during dry weather, but during wet weather (when combined-sewer systems do not have any extra capacity). Judge Penrod rejected this argument, holding that

the law regulates and thus allows CSOs. The petitioners chose not to take the next step in litigation which would have been an appeal to the Marion Superior Court.

The petitioners, however, have not given up. Having failed to obtain the results they wanted in litigation, they have now turned to IDEM's rule-making process. The attorney who represented petitioners is spearheading an effort to amend the

rules under which IDEM considers permits to construct sewer lines. The proposed amendments would require IDEM to reject applications if the treating system does not have sufficient capacity during wet-weather events. In other words, under the proposed regulation every one of the

more than 100 Indiana communities with CSOs would not have capacity to accept additional connections unless the sewage is stored during wet weather, or an offset is found elsewhere in the system. According to

experts, storage of untreated sewage may be dangerous and unworkable. The likely upshot of the proposed amendments is that new development

— continued page 4

Communities will continue to need to accommodate growth.

The proposed amendments would require IDEM to reject applications.

Communities with CSOs

According to IDEM, the following Indiana communities have CSOs. They would bear the brunt of attacks on development if proposed new sewer construction rules are approved.

- | | |
|----------------|------------------|
| Akron | Marion |
| Albion | Markle |
| Alexandria | Michigan City |
| Anderson | Middletown |
| Angola | Milford |
| Attica | Mishawaka |
| Auburn | Monticello |
| Aurora | Montpelier |
| Avilla | Mount Vernon- |
| Berne | Muncie |
| Bluffton | Nappanee |
| Boonville | New Castle |
| Brazil | New Haven |
| Bremen | Noblesville |
| Brownsburg | North Judson |
| Butler | North Manchester |
| Chesterfield | North Vernon |
| Chesterton | Ossian |
| Clinton | Oxford |
| Columbia City | Paoli |
| Columbus | Peru |
| Connersville | Plainfield |
| Crawfordsville | Plymouth |
| Crothersville | Portland |
| Crown Point | Redkey |
| Decatur | Remington |
| East Chicago | Rensselaer |
| Eaton | Richmond |
| Elkhart | Ridgeville |
| Elwood | Rockport |
| Evansville | Rossville |
| Fairmount | Royal Center |
| Fortville | Rushville |
| Ft. Wayne | Seymour |
| Frankfort | South Bend |
| Gary | South Whitley |
| Goshen | Speedway |
| Greenfield | Sullivan |
| Greensburg | Summitville |
| Hammond | Tell City |
| Hartford City | Terre Haute |
| Huntington | Tipton |
| Indianapolis | Valparaiso |
| Jeffersonville | Veedersburg |
| Kendallville | Wabash |
| Knox | Wakarusa |
| Kokomo | Warren |
| Lafayette | Warsaw |
| LaPorte | Washington |
| Ligonier | Waterloo |
| Logansport | West Lafayette |
| Lowell | Winamac |
| Madison | |

The PLEWS SHADLEY RACHER & BRAUN newsletter is published as a service to our clients, colleagues and others for informational purposes only. These materials should not be considered as, or a substitute for, legal advice. © 2001 PLEWS SHADLEY RACHER & BRAUN



PLEWS SHADLEY
RACHER & BRAUN
ATTORNEYS AT LAW

1346 N. Delaware Street
Indianapolis, IN 46202-2415

perspective




PLEWS SHADLEY
RACHER & BRAUN
ATTORNEYS AT LAW

Environmental Ruling Rejects Sewer Ban

— *Continued from page 3*

in Indiana would grind to a halt.

The Environmental Protection Agency and IDEM realize that the problem of CSOs cannot be solved overnight. The problem is complex and involves numerous local, state, and federal agencies, and implicates the broadest public interest. CSOs are widespread and involve infrastructure that is as necessary as it is ubiquitous. A remedy will require large expenditures from the public fisc, i.e., from taxpayers, and will take years, possibly decades, to implement. For instance, the City of Indianapolis has

announced a long-term plan to reduce the amount and frequency of its CSOs. This plan will require twenty years to implement and will cost \$878 million. In addition, the CSO problem will require input from all sectors of the affected public, and not one small group. During this process, communities will need to accommodate growth and the resulting requirements for sewage treatment. Judge Penrod's decision makes this accommodation more feasible. 

The solution to the problem of CSOs cannot be solved overnight.