

MAY 22 1986

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

Environmental Appeals Board

APPEAL OF: )  
WILLARD A. INGERSOLL )

OPINION AND ORDER

This matter came to a hearing before the Environmental Appeals Board on May 7, 1986. Present for the Board were Thomas A. Kealy, Chairman, and members Evelyn Greenwood, Clifford Hubbard and Ray Woodward. Peter Hess, Deputy Attorney General appeared on behalf of the Secretary. The appellant was self-represented. Barbara MacDonald, Deputy Attorney General, advised the Board.

SUMMARY OF EVIDENCE

Mr. Ingersoll appealed the Secretary's denial of a permit to install onsite wastewater disposal systems on three lots owned by Mr. Ingersoll in Pearsons Corners, near Hartley, Delaware. A packet containing a chronology and documents from the Secretary's file showing the history of Mr. Ingersoll's application for a permit was marked as Exhibit 1. Section (b) of Exhibit 1, Mr. Ingersoll's application for a construction permit, demonstrates that he originally filed the application on April 29, 1985. Mr. Ingersoll introduced six photographs of his lots and those of his immediate neighbors, marked as Exhibit 2. Mr. Ingersoll introduced as Exhibits 3, 4, and 5 copies of documents pertaining to the application for similar wastewater disposal systems made by

his immediate neighbors, the McDougals, the Coxses, and the Bylers. These documents show that all three of his neighbors were able to obtain septic tank permits.

Mr. Ingersoll testified that his lots were tested on December 12, 1985. On that date, the water table on lot 1 was found to be at 18 inches, while lots 2 and 3 were each found to have a water table of 24 inches. The results of the soil evaluation are contained in Exhibit 1, Section (c). Mr. Ingersoll testified that he is willing to construct an above ground system and to hire an engineer to design the system in accordance with the Secretary's specifications.

Lyle A. Jones, a soil scientist for the Department of Natural Resources and Environmental Control, testified that he had reviewed Mr. Ingersoll's application, although he did not conduct the soil tests. Mr. Jones testified that the test results show the three lots all contain Pocomoke soils which are poorly drained and have moderate to low permeability. Mr. Jones testified that this soil type could cause a septic system to back up or to release untreated effluence into the water table. Mr. Jones examined the application of the McDougal property, Exhibit 3, and testified that it showed that on the date that property was tested the water table was at 24 inches and soil mottling, reflecting the seasonal highwater table, was found at eight inches.

Mr. Roy Parikh, an environmental engineer for DNREC and head of the Water Resources Program, testified that Mr. Ingersoll's

application was denied on the basis of the regulations in effect prior to July 1, 1985, because Mr. Ingersoll had filed his application prior to that date. Under these "old" regulations a permit for septic system was denied if the water table was found to be under 48 inches. However, if the water table was found to be between 20 and 48 inches, the regulations called for the applicant to be given an opportunity to show that he could construct a system, for instance an above ground system, which would meet the Secretary's criteria. Mr. Parikh testified that Mr. Ingersoll's application proposed a system elevated 18 inches about the ground, and that this did not meet the Secretary's requirements even under the old regulations. Mr. Parikh also testified that the file reflected that prior testing had taken place on the same property; on November 28, 1983, the water table was found to be at 14 inches, while on September 11, 1984, no water was found to a depth of 64 inches. Mr. Robert Zimmerman, the supervisor of the Water Pollution Control branch of DNREC from 1979 to March 1986, testified that it was the Department's practice, under the "old" regulations to consider prior tests done on a particular plot when evaluating a septic tank permit application. Thus, Mr. Zimmerman testified that Mr. Ingersoll's application was denied on lots 2 and 3, without him being given an opportunity to demonstrate his ability to construct a complying system because the prior tests conducted on November 28, 1983 found a water table at 14 inches, which was above the 20 inch cutoff for special systems.

### FINDINGS OF FACT

The Board finds:

That on December 12, 1985, the water table on Mr. Ingersoll's lot no. 1 was found to be below 20 inches. The water table for lots 2 and 3 were found to be above 20 inches.

That the DNREC did not give Mr. Ingersoll an opportunity to demonstrate that he was able to construct a system so that it would not "cause or contribute to a state of pollution" under former Water Pollution Control Regulation No. 2 Governing the Installation and Operation of a Septic Tank Sewage Disposal Systems, dated October 1968, §806.

That the DNREC's practice under the "old" regulations was to allow such a special showing to be made in situations where the water table was found to be above 20 inches.

### CONCLUSIONS OF LAW


The Board finds that the Secretary acted arbitrarily and capriciously in failing to give Mr. Ingersoll the opportunity, required by the regulations applicable at the time of his application, to make a special showing of his ability to construct a system which would not cause or contribute to pollution, despite that the soil evaluation tests conducted December 12, 1985 demonstrated that lots 2 and 3 had, on that date, water tables which would make them eligible for such special consideration. The Board finds unconvincing the DNREC's justifi-

cation for this failure that prior tests of the same property showed that the water table rose above 20 inches. It is not contested by the DNREC that their former regulations were inexact in that they measured the actual water table on a given date rather than the seasonal high water table. Thus, under the former regulations a property owner was eligible for a septic system if, on the date the test was taken, the water table was below a certain level, regardless of whether the seasonal high water table rose above that level. Thus, for example, the evidence reflects that Mr. Ingersoll's neighbor, Mr. McDougal, was granted his application on the basis of a test which showed the water table on the date of the test to be at 24 inches although the soil mottling demonstrated that the seasonal high water table was at eight inches.

Thus, the DNREC's argument that prior tests gave them special knowledge that the water table on Mr. Ingersoll's lots would rise above 20 inches is not convincing, since they had such special knowledge as well of Mr. McDougal's property, and yet granted Mr. McDougal's application. The Board finds that since the test conducted on December 12, 1985 found the water table on Mr. Ingersoll's lots 2 and 3 to be below 20 inches, Mr. Ingersoll should be given the opportunity to demonstrate, under §806 of the "old" regulations that he is able to construct a system which will not cause or contribute to a state of pollution. The

standards which the DNREC is to apply to the evaluation of the system which Mr. Ingersoll proposes for lots 2 and 3 are to be those which the Secretary would have applied prior to July 1, 1985.

SO ORDERED.

  
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Thomas J. Kealy, Chairman

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Evelyn Greenwood

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Clifford Hubbard

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Ray Woodward

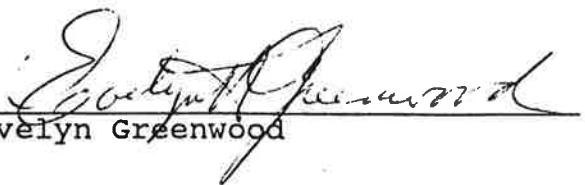
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Richard C. Sames

Dated:

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Clifford Hubbard

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Ray Woodward

Dated: *5/24/86*

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*Clifford H Hubbard*  
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Clifford Hubbard 5/24/85

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*Ray K Woodward* 5/27/80  
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Richard C. James

Dated: