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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

September 13, 1984

COPY

FILE NO. 84-015

ENVIRONMENTAL PROTECTION:
Abrogation of Contract

David Kenney, Director
Illinois Department of Conservation
Lincoln Tower Plaza
520 South Second Street
Springfield, Illinois 62706

Dear Mr. Kenney:

I have your letter wherein you inquire whether the Illinois Department of Conservation [DOC] can be required to pay the North Shore Sanitary District [NSSD] for the treatment of sewage generated at the Illinois Beach State Park. You have advised that on February 9, 1956, DOC entered into a contract with the NSSD, the salient features of which are as follows:

(1) the State of Illinois agreed to pay $30,000.00 toward the construction of the NSSD sewage system and any future sewage systems which may be built during future development and expansion of the park;

(2) the State of Illinois agreed to maintain all sewage lines within the park;

(3) NSSD agreed to maintain the sewage interceptor, facilities, and equipment and to receive all sewage from Illinois Beach State Park; and

(4) NSSD agreed that it would not impose a service charge on DOC for the processing of the sewage received from Illinois Beach State Park.

The contract contains no limitation regarding the duration or term of the contract. Since the execution of the contract, DOC has not paid any service charges for the processing of sewage NSSD receives from the Illinois Beach State Park.

You have further advised that your question has been precipitated by the contention of the NSSD that it is no longer bound by the 1956 contract for the reasons set forth below. Consequently, the NSSD is billing DOC for the treatment of the sewage generated at the park. Relying on the 1956 contract, DOC maintains that it is not liable for any service charges. For the reasons hereinafter stated, it is my opinion that the 1956 contract is terminable at will, and therefore, the NSSD may terminate the contract and impose upon and collect from DOC a reasonable service charge for the processing of sewage received from the Illinois Beach State Park.

The NSSD posits that Federal law has abrogated the 1956 contract. In the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (33 U.S.C. § 1251

et seq.), Congress instituted a program under which the Federal government would make grants to State and local governments for the construction of water treatment works. Section 204(b)(1)(A) of the Clean Water Act (33 U.S.C. § 1284(b)(1)(A)) provides in pertinent part as follows:

> " * * *
>
> (b)(1) Notwithstanding any other provision of the subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; * * *
>
> * * * "

(Emphasis added.)

Pursuant to the above statute, the U.S. Environmental Protection Agency (E.P.A.) has promulgated regulations to implement the Federal grants for water treatment works. (See 40 C.F.R. § 35.900 et seq. (1983).) Section 35.929-1 of Title 40 of the Code of Federal Regulations provides in part as follows:

> " * * *
>
> (a) User charge system based on actual use. A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement)

> costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.
>
> * * * "

The E.P.A. regulations also state at 40 C.F.R. § 35.929-2(g) (1983):

> "(g) Inconsistent agreements. The grantee may have preexisting agreements which address: (1) The reservation of capacity in the grantee's treatment works, or (2) the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or Federal agencies or installations) which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and these regulations." (Emphasis added.)

Since DOC is not paying a user charge based upon its proportionate share of the costs of the operation of the treatment facilities, the NSSD has submitted that Federal law is not being complied with and that DOC is liable for such charges. Despite the above-quoted provisions, it is my opinion that the Federal statute and regulations promulgated thereunder do not impair, abrogate, or otherwise invalidate the 1956 contract between DOC and the NSSD.

In City of New Brunswick v. Borough of Milltown (3d Cir. 1982), 686 F.2d 120, cert. denied, 103 S. Ct. 1184 (1983), the court considered whether section 204(b)(1)(A) of the Clean Water Act and the E.P.A. regulations abrogated a 1914 contract between two municipalities in which one municipality agreed to treat the other's sewage without charge in exchange for the other's promise to refrain from discharging its sewage into a stream which was the first municipality's source of drinking water. Declaring that the E.P.A.'s decision to withhold Federal grants to the first municipality while the first municipality honored the 1914 contract was legitimate, the court stated as follows:

" * * *

* * * [I]t cannot be denied that EPA's decision to withhold funds makes abrogation of the [1914] contract a more attractive alternative than it might otherwise be. That fact alone, however, cannot constitute a sufficient basis for deeming section 204(b)(1) to impair the obligation of a contract, for 'to hold that motivation or temptation is equivalent to coercion [would be] to plunge the law in endless difficulties.' [Citation.]

The reason why 'temptation' cannot be deemed equivalent to 'coercion'--that is, to contract impairment--is not hard to discern. As a general rule, it is clear that 'Congress may fix the terms on which it shall disburse federal money to the States.' [Citations.] Moreover, while that power is not without limits, see 451 U.S. at 17 n.13, 101 S.Ct. at 1540, it is indisputable that the power to fix terms lies essentially with the Congress, and not with the federal courts. Yet because a great many if not all conditions on

> federal grants might very well have an impact on pre-existing contractual arrangements, to hold that every condition of a federal grant program that possibly enhances the likelihood that a contract will be breached is an 'impairment of contract' in the constitutional sense, would be tantamount to ruling that virtually every federal funding statute is subject to the heightened judicial scrutiny that is invoked whenever the contract clause is implicated. As a result, no condition in a federal grant program could be upheld unless it was demonstrated to the satisfaction of the courts that the condition represented the only way to achieve an important state purpose. [Citations.] To adopt such an approach would be drastically to undercut Congress' broad discretion to set such terms on federal funding programs as it deems appropriate, and, in consequence to give to the courts extensive power over the conditions that may be attached to the disbursement of federal money. * * *
>
> * * * As a matter of state law, the obligations of the 1914 contract remain untouched by the district court's decision; the user charge requirement of section 204(b)(1) and the applicable regulations do not by their terms purport to abrogate the [1914] contract, nor do they inevitably require such impairment. * * *
>
> * * * "

(Emphasis added.) City of New Brunswick v. Borough of Milltown (3d Cir. 1982), 686 F.2d 120, 134-35.

Based upon the foregoing, it is my opinion that section 204(b)(1)(A) of the Clean Water Act and the regulations promulgated thereunder do not invalidate or abrogate the 1956 contract between DOC and the NSSD. The validity of such contract is determined by State law, and the Federal law merely provides that if an applicant for a Federal grant for the

construction of water treatment facilities abides by a pre-existing, inconsistent contract regarding user charges, the E.P.A. may legitimately deny the application or withhold grant funds.

It is, however, my opinion that, under State law, the NSSD may terminate the 1956 contract at will and thereafter impose reasonable user charges in accordance with the Clean Water Act upon DOC for the treatment of sewage generated at the Illinois Beach State Park.

It is clear that a sanitary district has authority to collect a reasonable charge from its users. (*See* section 7 of The Sanitary District Revenue Bond Act (Ill. Rev. Stat. 1983, ch. 42, par. 319.7); *see also* *DuPage Utility Co.* v. *Illinois Commerce Commission* (1971), 47 Ill. 2d 550; *Hartman* v. *The Aurora Sanitary District* (1961), 23 Ill. 2d 109.) Furthermore, a sanitary district may collect user charges from other units of government (*Board of Education, School District No. 150, Peoria* v. *The Greater Peoria Sanitary and Sewage Disposal District* (1980), 80 Ill. App. 3d 1101), and this rule clearly extends to State government when it accepts the sewage service provided. (*Opinion of the Justices* (S. Ct. N.H. 1944), 39 A.2d 765, 767.) Consequently, DOC is responsible for user charges imposed by a sanitary district unless it makes other arrangements with the sanitary district.

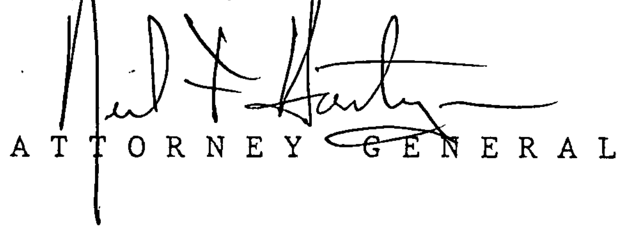
As stated above, the 1956 contract between DOC and the NSSD provides that the NSSD would process the DOC sewage generated at the Illinois Beach State Park at no cost. Moreover, the contract contains no termination date.

In Adkisson v. Ozment (1977), 55 Ill. App. 3d 108, the defendant city contracted with the plaintiffs in 1957 for the city to furnish water service to the plaintiffs in exchange for which the plaintiffs expended $47,000.00 to install the water service. The contract did not contain a termination date. In 1975, the city attempted to terminate the contract. Plaintiffs alleged that such termination would breach the contract and that, in any event, the city should be estopped from the attempted termination because of expenditure by the plaintiffs made in reliance on the contract. Stating that the absence of a termination date does not necessarily render a contract void, the court held that if a contract contemplates a single act or exchange of acts, the law will imply a reasonable time for performance. In this case, the court determined 18 years to be a reasonable duration. On the other hand, the court stated that a contract calling for continual or perpetual performance and containing no provision for its duration is terminable at will. (Adkisson v. Ozment (1977), 55 Ill. App. 3d 108, 113.) Furthermore, the court held that the doctrine of equitable estoppel would not be applicable under the circumstances of the

case, reasoning that equity would not bind the city to provide water to the plaintiffs for all time. (Adkisson v. Ozment (1977), 55 Ill. App. 3d 108, 114.) Consequently, the city was free to terminate the contract. See also Peters v. The Health and Hospitals Governing Commission (1982), 88 Ill. 2d 316, 318, wherein the court held that if contracts are construed to be of perpetual duration, they are terminable at will.

Accordingly, under the reasoning of Adkisson v. Ozment (1977), 55 Ill. App. 3d 108, it is my opinion that the 1956 contract between DOC and the NSSD calls for perpetual performance, and therefore, the contract is terminable at will. If the NSSD does in fact terminate the 1956 contract, it may impose upon and collect from DOC a reasonable charge for the processing of sewage that the NSSD receives from the Illinois Beach State Park.

Very truly yours,



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