STATE OF INDIANA

STREAM POLLUTION CONTROL BOARD

INDIANAPOLIS 46206

1330 West Michigan Street
633-5467

Wednesday, October 4, 1978
City Council Chambers, Room 126
City-County Building, 1 Main Street, Fort Wayne, Indiana
2:30 p.m., EST

This is a public hearing before the Stream Pollution Control Board in a cause docketed before the Board as Cause No. B-422,

IN THE MATTER OF THE PETITION OF THE BOARD OF COMMISSIONERS OF ALLEN COUNTY, INDIANA, FOR THE ORGANIZATION OF A REGIONAL SEWAGE DISTRICT TO BE KNOWN AS THE "ALLEN COUNTY REGIONAL SEWAGE DISTRICT," ALLEN COUNTY, INDIANA, PURSUANT TO IC 19-3-1.1

Notice of time and place of hearing was given as provided by law by requesting publication on Wednesday, September 20, 1978, and on Wednesday, September 27, 1978.

Proof of publication of the notice has been received by the Board and the notice and the proofs are now incorporated in the record of this cause by reference and placed in the official files of the Board.

Notice has also been given to the Hearing Commissioner and the Office of the Attorney General.

My name is Robert G. Grant.

I am an attorney for the Indiana State Board of Health and have been appointed by the Stream Pollution Control Board to Act as Hearing Officer in this cause by virtue of the authority granted in IC 13-7, and by resolution adopted by the Environmental Management Board of the State of Indiana on May 9, 1972.

Appearance blanks have been distributed in the hearing room for all those desiring to be shown as appearing of record in this cause. If you have not already filled out the form, please do so and indicate if you are appearing for yourself or on behalf of a group or an organization and identify such group or organization. Also, note the capacity in which you appear--such as attorney, officer or authorized spokesman. If you failed to include this information on the appearance slip that has already been given to me, please include this information as you give your formal presentation. Those who have yet to complete their appearance slips and desire to be heard should hand the slips to me and I will include them with the official record of this proceeding.

Oral statements will be heard, but written statements may be handed to the hearing officer at this hearing or mailed to the Office of the Hearing Commissioner, Indiana State Board of Health Building, Room A-412, 1330 West Michigan Street, Indianapolis, Indiana, 46206, within ten days after this hearing is adjourned. Comments will be considered by the Board before final approval of this Petition.

FINAL STATEMENT

These proceedings, pursuant to notice, are hereby concluded. This cause is therefore adjourned until further order of the Control Board.

STATE OF INDIANA

STREAM POLLUTION CONTROL BOARD

IN THE MATTER OF THE ORGANIZATION
OF A REGIONAL SEWAGE DISTRICT
IN AND FOR THE COUNTY OF ALLEN, CAUSE NO. B-422
STATE OF INDIANA.

WRITTEN COMMENTS SUPPLEMENTING
ORAL TESTIMONY BEFORE HEARING OFFICER
ROBERT G. GRANT, ON OCTOBER 4, 1978

The Board of Commissioners of Allen County, Indiana, the Petitioners herein, and William L. Sweet, the Allen County Surveyor, in support of the above entitled Petition, as amended, and in support of that certain Hearing Officer's recommended order filed in the proceeding on or about August 16, 1977, and supplementing all their previous testimony in the above entitled matter, including that oral testimony delivered to Hearing Officer, Robert G. Grant in Fort Wayne, Allen County, Indiana, on October 4, 1978, would show the Board:

I. WITH RESPECT TO THE POSITION OF THE CITY OF FORT WAYNE AND THE FORT WAYNE CITY UTILITIES.

It is the position of your Petitioner that the amendments to the above entitled Petition, requiring that the Regional Sewage District automatically contract upon the annexation of certain of its territory by the City of Fort Wayne or the actual rendition of services to an area within the district by Fort Wayne City Utilities, is the best method for protecting the citizens of Fort Wayne and Allen County, and will incidentally protect the City of Fort Wayne,

Fort Wayne City Utilities and the Regional Sewage District. The City's and City Utilities' proposal of exempting areas where they hope to be able to provide services within seven or 15 years will create a potential vacuum for citizens of those areas which might needlessly prevent the residents of those areas from obtaining services should the City Utilities, for financial or any other reasons, decide it is not expedient to build in a certain area. It is your Petitioners' position that it is anticipated that, and in fact hoped that, Fort Wayne City Utilities will in fact provide sewer services to large portions of the area delineated in the City's projected seven and 15 year areas. The amendments to the Petition in fact encourage such expansion of service and in no way inhibit the City from planning, constructing and providing those services. It is simply your Petitioners' position that there may be areas where the City for some reason does not construct sewers and where the proposed district could provide the residents of the area with the financing mechanism to enable them to obtain the benefits of the City's sewage treatment facilities by permitting the district to build the local collector sewers that would be connected to the City's interceptor sewers system.

II. WITH RESPECT TO THE POSITION OF THE SEWAGE UTILITY OF THE TOWN OF GRABILL.

Because your Petitioners were not aware of the fact that the sewage utility of the Town of Grabill had any intention of expanding outside of its present town boundaries until the middle of the afternoon of the day before the most recent October 4th hearing, the Petitioners have only recently fully and finally formulated their position with respect to the petition to intervene of the sewage utility of the Town of Grabill. It is your Petitioners'

view that to remain consistent in its treatment of the Town of Grabill and the other cities and towns within the county, it is necessary for Petitioners to take the position that they would agree to an automatic contraction of the district as Grabill's utilities expanded; so long as that expansion never exceeded the four sections which the Petitioners originally suggested to the town fathers of Grabill. In this light, your Petitioners would suggest that paragraph 4.A.4. be amended by adding the following provisos:

> Provided, however, that it is understood and intended that the boundary of the Allen County Regional Sewage District will, in the future, automatically be changed to exclude, as to any area within the district which is at that time not actually served by the district or any area not under contract for the construction of sewers or for any area for which the sale of bonds have not been authorized by the proper body of the district for the construction of sewers, (a) any area finally annexed to the Town of Grabill, or (b) any area subsequently serviced by the sewage utility of the Town of Grabill; and, (c) provided further it is understood and intended that the boundary of the Allen County Regional Sewage District may be changed upon the petition and agreement of the Town of Grabill, Indiana, and/or the sewage utility of the Town of Grabill, to exclude areas that are then served by the district, upon the execution of an agreement agreeing to assume any and all charges, liabilities or indebtedness created by virtue of contracts or bonds for the construction or financing of sewers serving that area; provided, further, however, that it is understood and intended that in no event shall the sewage utility of the Town of Grabill service any area, nor will the district automatically contract outside an area which consists of the following real estate in Allen County, Indiana, more particularly described as follows, to-wit:
>
> that area bordered on the north by the centerline of Springfield Center Road, on the east by the centerline of Cuba Road, on the south by the centerline of Antwerp Road, and on the west by the centerline of Page Road.

III. WITH RESPECT TO THE POSITION OF DIVERSIFIED UTILITIES, ET AL.

Your Petitioners herein take issue with that "objection to recommended order," dated August 25, 1975, by Diversified Utilities, Inc., Sewage Utilities of Indiana, Inc., Clearwater Utilities, Inc., and Maplewood Park Utilities, Inc., (referred to in their document as objecting private utilities). It is your Petitioners' position that the theory that the objecting private utilities are subject to the exclusive control of the Public Service Commission of Indiana is not well taken. The objecting private utilities' theory is that pursuant to the terms of I.C. 8-1-2-89 (b), Acts 1913, Chapter 76, Sec. 97 (c), as added by Acts 1957, Chapter 313, Sec. 2, that the operation and control of private utility companies is under the exclusive supervision and control of the Public Service Commission of Indiana. Their position was, at one time, correct, to-wit: from 1957 until February 25, 1976. Since that time, however, there has been a change in Indiana law on the subject via an amendment of the very statute permitting the formation of regional sewage districts, to-wit: I.C. 19-3-1.1-5.2, Acts 1973, P.L. 195, Sec. 5,p. 1030; as added by Acts 1976, P.L. 86, Sec. 5,p. 337. (H.B. 1168, approved February 25, 1976.) That statute provides:

> A sewage company which is subject to the jurisdiction of the Indiana Public Service Commission under I.C. 8-1-2-89, and all the territory lying within the area which shall hold a certificate of territorial authority, shall be exempt from all ordinances and regulations adopted by the Board of Trustees of a district established under this Chapter, except those ordinances and regulations pertaining to maintenance and operation, until such time as connection is made to the sewage system of said district and said district commences rendition of service within the area covered by such certificate of territorial authority". (Emphasis added)

In short, the exclusive control of the Public Service Commission was terminated by the Indiana Legislature when it repealed by implication that power in its 1976 amendment of I.C. 19-3-1.5-5.2. The utilities' position is not well taken and flies in the face of all the accepted rules of statutory construction. As is so ably pointed out at 1A Sutherland, Statutory Construction, Sec. 23.01 (4th ed. C. Dallas Sands 1972) "(v)ery few statutes are purely declaratory in the sense of doing no more than commit to the form of an enacted text rules and norms which were already in effect. All other legislation changes the law in some way from what it was before. By superceding either statute law or common law as it was before, most Acts can be said to have repealing effects". In the situation at hand, both the theory and results are well stated, id. Sec. 22.22 wherein Sutherland states:

> "On the basis that the latest declaration of the Legislature prevails, the inconsistent provisions of the prior statute, or the whole prior statute if the latter Act is intended as a substitute, are treated as repealed.
>
> Where the existence of a prior Act is only partially terminated by the inconsistency of provisions in a later Act, the repeal provisions of the prior Act are necessarily replaced by the inconsistent provisions of the new Act, thus in substance altering or amending the prior Act."

See also State v. Doversberger, 288 NE2d 585 (Ind.App. 1972); Branham v. Lange, 16 Ind. 497 (1861); Opp v. Davis, 133 Ind.App. 365, 179 NE2d 298 (1962); It is absolutely impossible to read these two statutes covering the very same issue and attach any other reasonable construction but that the former was repealed by implication. See also Copper v. General Dynamics, Convair Aerospace Division, 533 F2d 163 (CA 5th, 1976); Payne v. Buchanan, 148 NE2d

537 (Ind. 1958), on rehearing 150 NE2d 250 (Ind. 1958); State v. McCarty, 185 NE2d 732 (Ind. 1962); Guthrie v. Wilson, 149 NE2d 841 (Ind.App. 1958) cited at 1A Sutherland Statutory Construction, Sec. 23.09 (4th ed. C. Dallas Sands 1972).

Nor can the objecting utilities take any comfort from the fact that both the sections in question, I.C. 8-1-2-93 and 19-3-1.1-5.2 were amended during the same legislative session, the rule of Statutory Construction, that the latest expression of the Legislature will control, requires that the second Act to be amended, in this case I.C. 19-3-1.1-5.2 will control. See Newbauer v. State, 200 Ind. 118, 161 NE 826 (1928), as cited in 1A Sutherland, Construction, Sec. 23.17 (4th ed., C. Dallas Sands 1972). The theory is aptly stated, id, at Sec. 51.01, "whether two provisions enacted at the same time and relating to the same subject matter are embodied in one Act or two is dependent upon the arbitrary choice of the Legislature..." Whether a provision relating to the same subject matter as a prior enactment is enacted as an amendment thereto or as an independent Act is also dependent upon the arbitrary choice of the Legislature... ." In the case at hand, I.C. 8-1-2-89 was amended by Acts 1976, P.L. 25, Sec. 1, p. 118, the effective date of which was February 17, 1976. However, the amendments that added the specific provisions excepting from the control of the Indiana Public Service Commission the power to regulate maintenance and operation were promulgated by the Legislature by its amendment of I.C. 19-3-1.1-5.2 as Acts 1976, P.L. 86, Sec. 5,p. 337, approved February 25, 1976.

Finally, and equally destructive to the objecting utilities' position is their admission that their entire certificate of territorial authority and physical plant, easements, "rights, rights of way, franchises or other property..." may be condemned pursuant to I.C. 19-3-1.1-12.

The objecting utilities' argument that the Federal Bankruptcy Law pre-empts any state rule is, of course, moot at this point, as the bankruptcy proceedings have terminated and the properties have been sold to a new group of private investors.

WHEREFORE, your Petitioners, the Board of Commissioners of the County of Allen, Indiana, hereby request that the findings of fact and recommended order of August 16, 1977, of Robert G. Grant, Hearing Officer, on behalf of the Stream Pollution Control Board of the State of Indiana, as amended, be reinstated and forwarded to the full Board for its final action.

Dated this 13th day of October, 1978.

BOARD OF COMMISSIONERS OF
ALLEN COUNTY, INDIANA

By: _____
Richard M. Ellenwood

By: _____
Vance L. Amstutz

By: _____
Jack K. Dunifon

ATTEST:

_____
Joan D. Uebelhoer, Auditor
of Allen County

ALLEN COUNTY SURVEYOR

By: _____
William L. Sweet

ALLEN COUNTY ATTORNEY

By: _____
Thomas E. Ruzzo

Law Offices of
Van Valer, Wicker & Tandy
Suite 420
National Bank of Greenwood Building
300 South Madison Avenue
P.O. Box 405
Greenwood, Indiana 46142
Telephone (317) 888-1121

Joe N. Van Valer
Robert J. Wicker
Richard L. Tandy
Jon E. Williams

of Counsel
Joseph A. Wicker

October 13, 1978

Mr. Robert Grant
Hearing Officer,
Indiana Stream Pollution
Control Board
1330 West Michigan
Indianapolis, Indiana 46206

RE: Allen County Regional
Sewage District
Cause No. B-422
Our Ref: 77-192

Dear Mr. Grant:

This letter is intended to be a summary of the comments made for and on behalf of Heritage Lands, Inc., Aboite Corporation, TransAm Development Corporation, Jehl Brothers, Inc., LieChety and Associates, Inc., Amos and Elizabeth Zehr, Oren R. Sessions, Jessie Graber, Jr., David Zehr, Joseph L. Zehr and Thomas E. Zehr, made at public hearing held on the 4th day of October, 1978 in the City-County Building in Fort Wayne, Indiana.

The above remonstrators to the Petition for the Establishment of a Regional Sewage District in and for the County of Allen raised two basic questions. The first of such questions and objections, was to the language proposed by the petitioner as an amendment to their original petition which was proposed as paragraph 4(c). The language is submitted as an amendment and reads as follows (our underlining as to the offending language):

> Provided, however, that it is understood and intended that the boundary of the Allen County Regional Sewage District will, in the future, automatically be changed to exclude, as to any area within the District which is at that time not actually served by the District or any area for which the sale of bonds has not been authorized by the proper body of the District for the construction of sewers, upon the petition of the owner of any real estate within the District which petition includes

an agreement by any sewage treatment utility which has been excluded from the Allen County Regional Sewage District excepting the sewage generated, or to be generated, from such area.

The remonstrators expressed a concern with the above amendment which represents a fear that the District might dedicate the entire territory of the District to a bond issue, the proceeds of which would result in the construction of treatment facilities or distribution systems that would serve only a smaller portion of that area within the District. If such occurred, then the intent and purpose of the amendment would be totally defeated.

In order to alleviate that fear the herein remonstrators would propose that the following language be included in the order creating the Allen County Regional Sewage District:

"The District shall be prohibited from committing any portion of its territory to a bond issue which will not generate revenue as a result of the expenditure of the proceeds of such bond issue."

This language could have been included as an amendment to the petition as paragraph 4(c)(1). The writer has discussed this language with Mr. Ruzzo, attorney for the petitioner, and the petitioner has agreed to the use of the above quoted language in the order creating the District if the hearing officer and the Stream Pollution Control Board see fit to include such language.

The second point raised at the public hearing by the above remonstrators dealt with the substantial changes in the sewage treatment service area of the City of Fort Wayne since the initial filing of the original petition. Many of these changes have been wrought by the remonstrators in the development of real estate outside the city limits of the City of Fort Wayne, and within the area of the territorial franchise of Diversified Utilities, Inc. The real estate development in that 18 month period has primarily ocurred within the areas set out in the remonstrators "Request for Exclusion from said District" which was filed with the State of Indiana, Stream Pollution Control Board on July 6, 1977 and more particularly identified therein and on a map attached thereto and marked for the purposes of identification as Exhibit "A". Under the terms of the petitioner's Amended Petition, the real estate requested to be excluded could automatically be

excluded upon petition to the District by the remonstrators assuming an agreement by the City of Fort Wayne or Diversified Utilities, Inc. accepting the sewage generated, or to be generated, from such areas. This assumes, however, that the existing territorial franchise of Diversified Utilities, Inc. will be excluded from the territory of the District when and if the District is created. It would appear to be somewhat more logical to exclude those areas originally requested to be excluded by the remonstrators from the District at the outset. Especially since much development and construction has occurred in those areas since the filing of the petitioner's original petition. Accordingly, the herein remonstrators would renew their request for exclusion from the District and restate their filing of July 6, 1977.

Further, the remonstrators would respectfully the inclusion of the following language or the following language in substance:

> "The District shall be prohibited from committing any portion of its territory to a bond issue which will not generate revenue as a result of the expenditures of the proceeds of such bond issue."

Respectfully submitted:

VAN VALER, WICKER & TANDY

Joe N. Van Valer
Attorney for Remonstrators

JNVV/mr

cc: Thomas D. Ruzzo
Maclyn T. Parker
Henry P. Wehrenburg

RECEIVED
OCT 16 1978
STATE OF INDIANA
STREAM POLLUTION CONTROL
BOARD

4189 Greendale Drive
Fort Wayne, Indiana 46815

October 13, 1978

Mr. Robert Grant, Attorney
Indiana Stream Pollution Control Board
1330 West Michigan Street
Indianapolis, Indiana 46206

Dear Mr. Grant:

This letter is written as members of the Ranchwood Civic Association, members of the Association's Board of Directors, and residents of Allen County, Indiana, northeast of Fort Wayne.

Following up on attendance at the October 4th hearing at Fort Wayne regarding the formation of an Allen County Regional Sewer District, within the 10-day period following that hearing, we submit the following as our statement of interest and position in that matter.

On behalf of the residents in our area we are seeking the lowest attainable cost to each user for the installation of adequate sewer facilities within a time frame that is acceptable to our local Board of Health.

Based on our observation of the Maysville Sewer District cost studies in the Harlan area sewer installation, and discussion with its Board of Trustees, it is our belief that the cost to each property owner in the Sewer District may be as little as one-third of that to be experienced thru Barrett Bond funding. In addition, the financing charges on the difference in the above costs would appear to be much less under Sewer District funding.

It is our conviction that the inception of the Sewer District formation thru the installation of sewers may be accomplished in a period of less than the 7 to 15 year time span projected by the City of Fort Wayne. We are led to believe that the shorter time period via the Sewer District falls within the permissable time frame established by the Allen County Board of Health.

Inasmuch as the foregoing is an expression of the parties most vitally affected by the formation of the Sewer District, namely the property owners, we request that adequate consideration be afforded this statement.

Roy E. Trovinger

Roy E. Trovinger

Vernon E. Brandt

Vernon E. Brandt

cc: Wm. Sweet
Surveyor, Allen County