ILLINOIS POLLUTION CONTROL BOARD
April 14, 1971

CITY OF MATTOON )
)
)
v. ) # 71-8

ENVIRONMENTAL PROTECTION AGENCY )

Opinion of the Board (by Mr. Currie):

This is a most depressing case in which the City asks for a variance because it thought the state was not serious when it prescribed deadlines for the construction of additional sewage treatment facilities. Lest any doubt remain, we declare once more that the state is indeed serious about expecting obedience to the law. It is high time people recognized that the persuasive demand for law and order applies to polluters as well as to burglars. How municipal and corporate officials can cluck their tongues over wayward youth while paying no attention to their own legal responsibilities is beyond our comprehension.

The City of Mattoon operates a seriously overloaded sewage treatment plant fed by an overloaded sewer system (R. 86-87, 165). Secondary treatment is provided to whatever flows the plant can handle, but additional flows are given only primary treatment (which removes the larger hunks) or bypassed as raw sewage directly to Kickapoo Creek from the plant or from the sewers themselves (R. 88-89, 113). Such overflows occur five or six times per month (R. 139).

Kickapoo Creek is a small intrastate stream with little capacity to assimilate wastes. The undisputed testimony is that the creek is seriously polluted below the plant and does not completely recover for six miles downstream (R. 186). Fish have been missing for years (R. 179, 194, & EPA recommendation); there are complaints of odors (R. 168, 172), the stream is inhabited by organisms tolerant of pollution (R. 186, 191-93), it is troubled by sludge banks, toilet tissue, and fecal material (R. 167). The EPA without contradiction attributed these conditions to the Mattoon sewage facilities (R. 182, 187). The Environmental Protection Agency in its recommendation reported that one person interviewed said "he had seen his cows leave a standing position in the creek water to walk to a nearby spring-fed pool in order to obtain drinking water."

It was no idle whim, therefore, that prompted the state Sanitary Water Board in March, 1968 to prescribe that on such streams as Kickapoo Creek secondary treatment was insufficient and that bypasses must be eliminated. The implementation schedule in Rules and Regulations SWB-14, Rule 1.08 paragraphs 9, 11b, and 14, requires that advanced treatment to produce an effluent with biochemical oxygen demand (BOD) of 4mg/l and suspended solids of 5 mg/l must be provided, and bypasses given primary treatment and chlorination, by July, 1972. In order to provide interim checkpoints to determine whether progress was being made, the regulations also required that for cities above 10,000 population (such as Mattoon) plans and specifications be completed 30 months before the deadline for completion of construction and construction contracts be awarded 21 months before. Notice of these requirements was admittedly received by the City in the spring of 1968 (R. 160).

The preparation of plans, the City now agrees, is a task that can be done within one year, and construction within another. The City was given by the regulation four years for a job it concedes can be done in two. Yet today it stands naked before this Board with no plans or specifications for advanced treatment even begun, much less completed, and with construction not slated to begin for more than another year in the future. The City acknowledges that it is "slightly" behind schedule and asks us placidly to approve a new schedule that would allow the filing of plans in March 1972, the letting of contracts in May 1972, and the completion of facilities in June 1973.

The statute provides for variances only upon a showing by the petitioner that compliance with the law would impose an "arbitrary or unreasonable hardship" (Environmental Protection Act, section 35). We have often made clear that whether the hardship of compliance is arbitrary or unreasonable can only be determined by a comparison of the benefits and of the costs of compliance: "The statutory variance test of unreasonable hardship is not satisfied by proof of hardship alone; it must be demonstrated that the hardships of complying with the law are disproportionately large in comparison to the benefits to the public of so doing." Texaco, Inc. v. EPA, #70-29 (Feb, 17, 1971). This is made clear by our procedural rules, which in Rule 401(a)(2) require the petitioner to include in his petition "a description of the costs that compliance would impose on the petitioner and others and of the injury that the grant of the variance would impose on the public."

The petition in this case does not comply with the rules. It contains no description of the injury that grant of the variance would impose on the public, and it includes no estimate of the contaminants discharged, as required by Rule 401(a)(1). In light of the evidence developed at the hearing, however, we shall proceed to consideration of the merits.

The hardship complained of is that, since the City has already missed the deadline for the submission of plans (January 1970) and the letting of contracts (September 1970), it cannot possibly meet them and that the time remaining before the final deadline for completion of the facilities is too short to permit that date to be met either (R. 75). We have already held, as should have been obvious, that "one cannot qualify for a variance simply by ignoring the timetable and starting late. . . . To allow a variance on the basis of. . [such] allegations would establish the preposterous proposition that the very existence of a violation is a ground for excusing it." Decatur Sanitary District v. EPA, # 71-37 (March 22, 1971).

The City attempts to avoid this conclusion by arguing that its delay was excusable. The record shows that the City was notified of the SWB-14 requirements in May, 1968. Having recently raised its sewer rates, the City decided to do nothing about complying with the new regulation until it had a year's experience to determine the amount of revenue available from the increased charge, which would affect the extent to which improvements could be financed out of revenue rather than general obligation bonds. The City also sought a federal grant (R. 31-32, 58). In 1969 the City employed the consulting firm of Wilson and Anderson to prepare a report (due in January 1970) determining what needed to be done to comply with SWB-14 (R. 34-35, 60-64).[1]

1. Wilson and Anderson were also authorized to proceed with the construction of primary sedimentation tanks that will help to alleviate the bypass problem. Bids have been let for this construction, and its completion is expected about September, 1971 (R. 66-67).

January 1970 came and went with no report from Wilson and Anderson. In April of that year the City told its consultants they would have to have the report in by a "very strict" deadline or lose the contract; the new deadline was not met either; in June the firm conceded it could not perform; in August 1970 a second firm was hired, which submitted the desired report the night before the hearing in this case--in March, 1971 (R. 69-73). This report does not contain designs for the construction of the needed facilities; design work is to start now and take ten months (R. 134-36), and construction is to commence after permits are obtained. Compliance is expected, as stated above, by June 1973.

The City attempts to shift the blame for its delay to its first contractor, Wilson and Anderson. There is no doubt that the contractor was derelict in its obligations toward the City. But, as we have stated before, the obligation to meet deadlines for abating pollution is that of the City, and it cannot abdicate its responsibility simply by employing an independent contractor: "Other petitioners should, however, be on notice that lack of delivery, when no efforts are made to effectuate timely delivery, will not be looked upon favorably by this Board. It would be a foolish precedent for this Board to establish that a variance petitioner after having done nothing to effect delivery may simply transfer the onus for non-completion of a job to his vendor." Marblehead Lime Co. v. EPA, # 70-52 (March 17, 1971). The City says it repeatedly contacted Wilson and Anderson in an attempt to spur them on (R. 70), but that is not enough. The City may not idly flail its municipal fists while its hired help sits on its hands. On an April 14 one cannot but wonder what the Internal Revenue Service would say to a taxpayer who claims his accountant was too busy to prepare the returns on time. It was the City's duty to build into its contract with its consultant whatever escape and penalty clauses were necessary to ensure that the contractor performed, to keep a close watch on the progress of work before the report was due, and to turn to another workman promptly when the first fell down on the job. The City said in closing argument that it supposed we could "find fault with the City for not firing Wilson and Anderson sooner." (R. 231). That's right. We can and we do.

Moreover, the City was remiss long before its contractor hit the canvas. The City wasted a year during which it made no progress toward designing advanced treatment facilities, although it now acknowledges that it is quite feasible to do design work while figuring out where the money for construction is to come from (R. 106-07). It entered into a contract for preliminary study that was to produce only a general report by January 1970,

the date when final plans and specifications were due. The deadline for filing plans would not have been met even if the contractor had done his job. We find the City's inattention to its responsibilities is responsible for the present violations of the regulations, and thus any hardship it suffers as a result of those regulations it has brought upon itself.

The City of Mattoon is thus in flat and inexcusable violation of its obligations under SWB-14. It does not qualify for permission to go on violating the law with impunity, as it has not shown satisfactory progress as the statute requires for extension of a deferred timetable (section 36 (6)). Yet, because the date for submission of plans has already passed, we must set a new deadline; failure to meet the deadline will result in additional penalties. In essence the setting of a new date amounts to a partial variance, though an undeserved one. For while we cannot condone the City's infractions, neither can we shut down the treatment plant, as we could with most industrial processes. To do so would result in more rather than less pollution, and thus the cost of a closing would enormously exceed the benefits. Thus we have no choice but to permit continued operation of the inadequate plant, but we must attach a number of conditions(section 36 (a) ) in order that the policies of the statute are not subverted. These conditions are designed, as in prior cases (e.g., Marquette Cement Mfg. Co. v. EPA, #70-23 (Jan. 6, 1971); City of Springfield v. EPA, #70-55 (Mar. 31, 1971) ), to assure compliance as rapidly as possible and to deter future violations of the law. To the terms and conditions of the order we now turn.

The Agency challenged the City's estimates of the time required for bringing the plant into compliance. While the City said ten months would be needed for planning, the Agency said this could be done in five; and while the City asked a year for construction (after a delay to obtain permits), the the Agency said the plant can be built in nine months (R.223).[2] It was of course disputed by the City (R. 116). Both the City's and the Agency's estimates were stated simply as conclusions, with no supporting evidence. The EPA attempted to show that the schedule could be advanced by overtime work; the City acknowledged that its timetable had been based on a normal five-day week, that if special priority were given extra men could be put on the job, and that the project "could be speeded up to a certain extent by applying overtime work." (R.124-26). The City also testified that some overtime work was already planned within the ten months allotted for design (R.136) and that "there is also

2. Another federal witness testified that delays could jeopardize the City's eligibility for federal grant aid (R.221-22). It appears that delays have already impaired the City's ranking on the federal priority list (R.210,230).

the point where you get so many people working on a project that you just can't absorb them and give them the proper supervision" (R. 126).

We cannot on this record say the City has demonstrated the need for the time it requests. As the burden is on the petitioner to prove the time needed for any delay in compliance (Sections 31 (c), 37), we shall order the City to submit complete plans by September 1, 1971, as requested by the Agency, and to meet the July 1, 1972 deadline for completion of the facilities required by SWB-14. The City will be free as those dates approach to seek additional time upon detailed proof that it has applied every available resource to getting the job done and that the time is too short. We shall insist at that time on receiving detailed work records demonstrating the number of men employed on the design and construction tasks and the number of hours worked. The City has said its time estimates are based on a five-day week; it will be incumbent on the City to show it has devoted that much time and more to getting back on schedule. To ensure that it does we shall require, as the statute provides when a delayed compliance date is set (sections 33(b), 36(a)), the posting of a bond or other security in the amount of $10,000, to be forfeited upon a finding by this Board that the City has failed without satisfactory excuse to comply with the terms of this order.

There is much talk in the record about the problems of financing the necessary improvements. The City has pussyfooted about in a continuing effort to determine how much of the financing can be done by revenue bonds, how much will be paid for by federal and state grants, and what remains to be financed out of general obligation bonds. Kickapoo Creek cannot wait for these deliberations to be resolved. Under section 46 of the Act we have authority to order the sale of bonds, including general obligation bonds, to finance improvements required by Board order, without regard to any referendum or to any statutory limits on bonded indebtedness. See League of Women Voters v. North Shore Sanitary District, supra. We think that remedy is appropriate here. We add that any suggestion by the City that the uncertain availability of federal funds excuses delay in construction is unfounded. The point was well stated by Mrs. Donald Wykis, who testified in opposition to the grant of a variance on behalf of the League of Women Voters of Mattoon:

> Municipalities were and are responsible for meeting the deadlines with or without the aid of state or federal assistance. The intent of the Federal and State Water Quality Standards and the position of the League is simple: The polluter is responsible for cleaning up his own mess. (R.206).

Accordingly, the City will be ordered to issue, no later than July 15, 1971, revenue or general obligation bonds in such amount as may be necessary to pay for the improvements required by SWB-14. Federal and state funds may be used later to reimburse the City for its expenditures, if they are made available; but the City must proceed with its own funds at once.

The City argues that is should be relieved from the harsh effects of a ban on new sewer connections that the Environmental Protection Agency has imposed as a result of its offenses. Specifically, it is pointed out that Kraft Foods is constructing a large frozen food plant at Mattoon and that the City has promised to accept wastes from that plant for additional treatment in its sewage facilities (R.38, 78-82). We recognize that any delay in the opening of the factory would be unfortunate, but it is the City that has not kept its promise to Kraft; for the City knew years ago that it had to upgrade its facilities, and it had no reason to believe it could accept additional wastes without doing so. Additional wastes fed to inadequate facilities, as we recently stressed in League of Women Voters v. North Shore Sanitary District, #70-7 (March 31, 1971), mean additional pollution. The law says pollution shall be reduced, not increased. The sorry state of Kickapoo Creek indicates that no additional waste load to that stream can be tolerated until advanced treatment is provided and the interceptors expanded. It is not enough that Kraft is planning to retain its wastes during storm periods so that they do not add to the overflow problem (R.153). The existing secondary facilities do not adequately protect the creek during dry weather either, and until the City is back on schedule it may not add more waste to an already inadequate system. Kraft may find alternative means of handling its wastes until the City is able to treat them properly, or it may accept the fact that the City's delay has caused the company to postpone its opening. What legal remedies Kraft may have against the City it is not for us to say. It is not without significance that the sewer ban places an important incentive upon the City to get the job done as quickly as is possible. In order to assure diligence it is desirable to make diligence in the interest of the City as well as of the suffering public.

We agree with the Agency that the issue of a permit for Kraft is not before us, since the issuance of permits is the Agency's responsibility. We hold that the hardship to Kraft because of the continuing sewer ban does not justify increasing the pollution of Kickapoo Creek, and, as in prior cases (League of Women Voters v. North Shore Sanitary District, supra; EPA v. Village of Glendale Heights, #70-8 (February 17, 1971)), we order that no new sewer connections shall be made until the project gets back on schedule.

Finally, the City quite blatantly suggested that it did not think the deadlines were meant to be met:

> There has been a change of policy in this State in my opinion. And perhaps it's right. I'm not criticizing the change of policy, but I think now the State is saying you have to do this when not too long ago they were much more willing to go along with you on an extension of time and of the deadlines that have been established.

(R.237. See also R. 92-95). The laws are meant to be obeyed. Those who flout them must be made an example to deter others from like conduct. The City will be ordered to pay a penalty of $1000.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The City of Mattoon is hereby ordered to submit to the Environmental Protection Agency, on or before September 1, 1971, final plans and specifications for the facilities required to bring its sewage collection and treatment facilities into compliance with Rules and Regulations SWB-14.

2. The City of Mattoon is hereby ordered to complete the construction of the facilities specified in paragraph 1 of this order no later than July 1, 1972.

3. The City of Mattoon shall post with the Environmental Protection Agency, on or before May 14, 1971, a bond or other security in a form to be determined by the Agency, in the amount of $10,000, such sum to be forfeited to the State of Illinois in the event that the City does not comply with the provisions of this order, as found by the Pollution Control Board in a supplementary proceeding.

4. The City of Mattoon shall, on or before July 15, 1971, issue without referendum such revenue bonds and/or general obligation bonds as may be necessary to finance the design and construction of facilities specified in paragraph 1 of this order.

5. The City of Mattoon shall complete the construction of the primary sedimentation tanks for reduction of bypasses by September 1,1971

6. The City of Mattoon shall not permit the connection of any new sewers or other sources of waste to its facilities, or any increase in the strength or concentration of wastes discharged to its facilities, until it demonstrates to the Agency that it is in full compliance with the require-

ments of SWB-14 with respect to overloads, bypasses, and the provision of advanced waste treatment.

7. The City of Mattoon shall pay to the State of Illinois, on or before May 14, 1971, the sum of $1000 as a penalty for violation of the water pollution regulations specifying dates for the submission of plans and the letting of contracts for construction of sewage treatment facilities.

I Regina E. Ryan, certify that the Board has approved the above opinion this 14 of April, 1971