ILLINOIS POLLUTION CONTROL BOARD
September 6, 1984

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 82-154
CITY OF MOLINE,	)	
Respondent.	)	

MS. ANNE L. RAPKIN (ASSISTANT ATTORNEY GENERAL) AND MR. E. WILLIAM HUTTON APPEARED ON BEHALF OF COMPLAINANT.

MR. RICHARD J. KISSEL OF MARTIN, CRAIG, CHESTER & SONNENSCHEIN AND MR. LARRY A WOODWARD, CITY ATTORNEY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon a December 30, 1982 complaint filed by the Illinois Environmental Protection Agency (Agency) alleging that the City of Moline (Moline) operated its North Slope sewage treatment plant (North Slope) in such a manner as to violate the Illinois Environmental Protection Act (Act) and various water regulations under 35 Ill. Adm. Code 302, 304 and 309. These alleged violations were to have occurred approximately between a three year period, 1979 to 1982. An Amended Complaint filed on April 21, 1983 alleged that Moline dumped sewer cleanings into a storm sewer between January 10 and 20, 1983. Hearings were held on December 13 and 14, 1983 in Moline, Illinois. Members of the public and press attended.

Preliminary Issues

Moline contends that it had a binding oral contractual agreement with the Agency which provided that the Agency would not enforce the Act against Moline while Moline was in the grants program. (Resp. Brief at 1, 8.) Moline supports this contention by referring to the testimony of Agency personnel who were present at meetings between the Agency and Moline on September 9, 1980 (Resp. Brief at 6 citing R. 181) and May 12, 1982 (Resp. Brief at 11, 12). Moline also cites the answer of Mr. Brom that he thought Moline was doing what it could to comply (Resp. Brief at 7 citing R. 328).

In the first place, the Board finds that there was no contract between the parties. The Agency does not have the authority to enter into such a contract. "It is fundamental that an Agency charged with implementation of a statutory framework ordinarily possesses no authority to deviate from or abdicate its statutory responsibilities." U.S. v. Wayne County Dept. of Health, 19 ERC 2091, 2096 (6th Cir. 1983). Although the Agency may use its discretion to delay an enforcement case when a grant proposal is pending, this conduct neither constitutes a binding contractual agreement nor estops the Agency in an enforcement proceeding. The proper vehicle for obtaining relief in such cases is the variance procedure provided for in Section 35 of the Act. Moline could have sought a variance at any time, if it determined that immediate compliance would cause it to suffer arbitrary or unreasonable hardship. Moline did not seek a variance.

Secondly, even if one assumes that there was a contract, a contract to continue to violate the law is fundamentally illegal. Waskey v. Hammer, 223 U.S. 85, 32 S. Ct. 187 (1912). Contracts to do that which is unlawful are void. A contract of the nature alleged by Moline would be inconsistent with the right of the public to a healthful environment (ILL. CONST. art. XI, § 2), the policy of the Clean Water Act (33 U.S.C. § 1251 et seq.), and the Illinois Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111½, pars. 1002, 1011). Furthermore, it would be against public policy (ILL. CONST. art. XI, § 1). George v. City of Danville, 383 Ill. 454, 50 N.E.2d 467 (1943). Similarly, the Agency personnel have no authority to bind the State to such an illegal agreement.

Thirdly, the Clean Water Act (33 U.S.C. § 1251 et seq.) provides that municipalities shall meet Section 301 effluent standards (Id. § 1311). This is accomplished by the Section 402 NPDES permit system and may be financed by the awarding of Title II federal grants for pollution control equipment (Id. §§ 1342, 1282). Even though Moline was in the grant program, it must comply with the effluent standards where it was technically and financially able. The receipt of grant funding is not a condition precedent to the duty to comply with effluent standards. State Water Control Board v. Train, 559 F.2d 921, 924 (4th Cir. 1977). U.S. v. Wayne County, supra. If it were, the Agency "would be pragmatically restricted to seeking compliance only in actions where it would guarantee federal funds to effect the compliance judgments obtained. This was patently not the intent of Congress." Id. at 2096.

Fourthly, Moline repeatedly refers to the inaction of the Agency (Moline "Reply" Brief, 4, 7, 10, 38) and appears to imply that the defenses of estoppel, waiver and laches would bar this proceeding. In U.S. v. Amoco Oil Company, 580 F. Supp. 1042 (W.D. Missouri, 1984) (ruling on a motion for Summary Judgment) suit was not filed until four and one-half years after the first of the alleged violations occurred, the court rejected the very same arguments. The court found the following: 1) laches does not apply where the government is acting in its sovereign capacity; 2) there is no estoppel in the absence of some affirmative misconduct on the part of the government; and 3) no defense of waiver can be asserted against the government since "public officers have no power or authority to waive the enforcement of the law on behalf of the public." 580 F. Supp. at 1050. The Board finds that likewise Moline has not shown a valid defense to this proceeding. Although the Amoco Oil court stated that "failure to take action more promptly may arguably have some bearing on the amount of any penalty to be imposed," the Board has already considered this in setting the penalty.

An Agency motion filed February 14, 1984 requested the Board to reverse certain hearing officer rulings. The Agency asserts that Respondent's Exhibit 8[1] should not be admitted because it was hearsay, that it contained hearsay, and that it referred to the issue of enforcement. Under the business records exception of the hearsay rule located at 35 Ill. Adm. Code 103.208, the lack of knowledge of the entrant goes to the weight of the evidence, not its admissibility. This rule is more liberal than either the federal or state rules and should be read in conjunction with 35 Ill. Adm. Code 103.204. However, Respondent's Exhibit 8 does contain enforcement decisions. A Board Order dated November 3, 1983 provides that "questions as to when and how the Agency and/or the Attorney General choose to take enforcement action would be irrelevant." Although the respondent may offer mitigating evidence, this evidence must not be contained in documents relating to enforcement decisions. The Board therefore reverses the ruling of the hearing officer and denies admission of Respondent's Exhibit 8.

Regarding Respondent's Exhibit 9, the ruling of the hearing officer is reversed for the same reasons supporting exclusion of Respondent's Exhibit 8.

Regarding Count V, the Agency attempted to introduce as evidence the testimony of the Agency's records witness Mr. Callaway and proposed C. Exh. 12. Moline objected and the hearing officer denied their admission. The Agency proceeded with an offer of proof. The Agency requests that the Board reverse the ruling of the hearing officer and accept the offer of proof and the exhibit as evidence. The Board finds that to allow the offer of proof and the exhibit as evidence would unduly surprise Moline. The Complainant had almost one year to fulfill its duty to disclose that it would present a records witness and the Respondent had a right to depose that witness before trial. The order of the hearing officer is affirmed.

1/ Respondent's Exhibits are incorrectly marked Petitioner's Exhibits; e.g., Resp. Exh. 8 is marked Pet. Exh. 8.

The Agency also requests that the Board overrule the hearing officer in denying admission to part of the Agency investigator's response at page 99 of the transcript. There is too much subjectivity, uncertainty, and a lack of connecting up in the investigator's "appeared . . ." answer. The hearing officer ruling is hereby affirmed.

In a similar vein, Complainant's Group Exhibit 11, photograph #3 was properly denied admission by the hearing officer. Although this photo is what the investigator saw on January 20, 1983, it was not connected up to any particular occurrence relating to this enforcement action.

Regarding the Agency motion at hearing to amend the complaint on its face to include January 6, 1983 in the sewer cleaning counts (VI, VII, VIII), the hearing officer is affirmed. The Agency under 35 Ill. Adm. Code 103.210 could amend the complaint as long as there was no undue surprise. There appear to have been many dates and different places discussed relating to alleged sewer cleaning (R. 142). The Agency had time to amend the complaint before trial and that to do so at hearing would have evoked undue surprise. The offer of proof containing Mr. Hill's testimony is denied.

Regarding the admissibility of the testimony of James Huff, the hearing officer ruled that his qualifications as an expert were subject to the qualifications of the individuals he relied on being established (R. 278-9). Moline offered the resumes of three individuals who purportedly were experts as Respondent's Exhibits 4, 5 and 6 for identification and the Agency objected on hearsay grounds (R. 284). The Board notes that if the resumes were offered to show that Mr. Huff is an expert, then the tendered documents are hearsay. However, where there is a joint report and the joint author resumes are offered to support its validity, then the resumes are admissible. Any questions would go the weight of the evidence. Herein, the hearing officer's conditional ruling was erroneous. The question of whether Mr. Huff is an expert is an independent question and should not be subject to the establishment of the qualifications of the joint study authors that he relied upon. Respondent's Exhibits 4, 5 and 6, the resumes of the joint study authors are admitted as evidence to support the validity of the joint study but not to show that Mr. Huff is an expert. The testimony of Mr. Huff is hereby admitted as expert based on the qualifications in his resume and testimony (Respondent's Exhibit 3, R. 289-90).

Discussion

The North Slope, a secondary treatment plant located in Moline, Illinois was constructed with about $3,000,000 in federal grant funds. It has a design average flow of 5.5 million gallons per day (MGD). It employs a contact stabilization mode of activated sludge process. Sewage passes through a bar screen into a wet well where it is pumped to a splitter box. This box divides flow to two circular primary clarification tanks with any flow over 13.75 MGD sent to three excess flow rectangular primary clarifier tanks. From the two circular primary tanks, flow is to two contact aeration tanks wherein microorganisms commonly called activated sludge digest the sewage nutrients. From there flow is to two square secondary clarifiers where the activated sludge settles to the bottom. The effluent from the two square secondary clarifiers is chlorinated or sent to the excess flow rectangular primary clarifier tanks for additional settling before discharge to Sylvan Slough of the Mississippi River.

Meanwhile, the activated sludge is sent to four reaeration tanks where they are given a chance to digest the sewage they picked up in the contact tanks. After four hours, they are returned to the two contact aeration tanks to begin a new cycle and the sludge is purged from the process, thickened, and sent to a sludge holding tank. Sludge from the two primary clarification tanks has already been removed and both sludge types are now mixed in the sludge holding tank. Sludge from the tank is dewatered onto vacuum filters and trucked for disposal off-site. An average of 45,000 dry pounds of sludge per day must be removed from the plant to prevent overloading of the facility with solids (C. Exh. 5).

The North Slope NPDES permit #IL0029947 was issued to Moline on June 22, 1977 for discharge into the Mississippi River and reissued on February 3, 1983. The 1977 permit established, *inter alia*, the following discharge limitations.

	Quantity		Concentration	
	30-day average	7-day average	30-day average	7-day average
BOD_5	417 kg/day	625 kg/day	20 mg/1	30 mg/1
TSS	521 kg/day	781 kg/day	25 mg/1	38 mg/1
Fecal Coliform (No. per 100 ml)	Daily maximum 400			
Chlorine Residual	Daily minimum 0.20 mg/1 Daily miximum 0.75 mg/1			

Attachment A, paragraphs 2(a), 2(b), and 2(d) of Respondent's NPDES permit provides that the plant be operated efficiently, optimally, and with adequate operating staff to insure compliance with permit conditions.

The ninth provision of the permit's Attachment B established that if the permittee does not comply with limitations in the permit, it should notify the Agency in writing [Notices of Noncompliance (NONs)] (C. Exh. 1-A). (On February 3, 1983 Respondent's NPDES permit was reissued. C. Exh. 1-B.)

The Agency alleges violations by Moline in eight counts. Count I alleges that on or about April 1, 1979 through December 30, 1982, Moline discharged into Sylvan Slough effluent containing five-day biochemical oxygen demand (BOD_5), total suspended solids (TSS), fecal coliform bacteria, and residual chlorine (Cl_2) in quantities and/or concentrations in excess of limitations set forth in its NPDES permit, in violation of its NPDES permit, 35 Ill. Adm. Code 309.102, and Section 12(f) of the Act. Section 12(f) provides:

> No person shall:
>
> f. Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term of condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

35 Ill. Adm. Code 309.102 provides:

> Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.

This section was later amended by adding a subsection (54 PCB 411, November 18, 1983, R82-10). The new subsection does not change the meaning of the section for purposes of this case.

Count II alleges that on or about June 12, 1979 through December 30, 1982 Moline discharged effluent into Sylvan Slough containing obvious color, turbidity and sludge solids in violation of 35 Ill. Adm. Code 304.106 and Section 12(a) of the Act. Section 12(a) provides:

> No person shall:
>
> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

35 Ill. Adm. Code 304.106 provides:

> In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

Count III alleges that on or about December 11, 1979 through December 30, 1982 Moline discharged effluent so as to cause or allow the presence of floating debris and unnatural color in Sylvan Slough in violation of 35 Ill. Adm. Code 302.403 and Section 12(a) of the Act (supra).

35 Ill. Adm. Code 302.403 provides:

> Waters subject to this subpart shall be free from unnatural sludge or bottom deposits, floating debris, visible oil, odor, unnatural plant or algal growth, or unnatural color or turbidity.

Count IV alleges that on or about April 1, 1979 through December 30, 1982 Moline failed to operate its facility as efficiently as possible and to provide optimal operation and maintenance of its facility in violation of Attachment A, paragraphs 2(a) and 2(d) of its NPDES permit, 35 Ill. Adm. Code 309.102 (supra) and Section 12(f) of the Act (supra). Count IV further alleges that on or about December 21, 1978 through December 30, 1982 Moline has failed to provide an adequate operating staff to carry out necessary activities at the facility in violation of Attachment A, paragraph 2(b) of its NPDES permit, 35 Ill. Adm. Code 309.102 (supra) and Section 12(f) of the Act (supra).

Count V alleges that on or about July 5, 1980 through December 30, 1982 Moline failed to inform the Agency that Moline did not comply with effluent limitations specified in its NPDES permit and failed to provide the required information within five days of becoming aware of the condition in violation of Attachment B, paragraph 9 of its NPDES permit, 35 Ill. Adm. Code 309.102 (supra), and Section 12(f) of the Act (supra).

Count VI alleges that between January 10 and January 20, 1983 Moline discharged contaminants from storm drains into the Mississippi River without an NPDES Permit in violation of Section 12(f) of the Act (supra).

Count VII alleges that between January 10 and January 20, 1983 Moline discharged effluent containing sludge, solids, unnatural color and odor into storm drains in violation of 35 Ill. Adm. Code 304.106 (supra) and Section 12(a) of the Act (supra).

Count VIII alleges that between January 10 and January 20, 1983 Moline discharged contaminants from storm drains so as to cause or allow the presence of sludge, debris, odor and unnatural color in the Mississippi River in violation of 35 Ill. Adm. Code 302.403 (supra) and Section 12(a) of the Act (supra).

To prove a violation under Section 12(a) of the Act complainant must show by a preponderance of the evidence that respondent caused, threatened or allowed water pollution. Allaert Rendering, Inc. v. IPCB and IEPA, 91 Ill. App. 3d 153, 414 N.E.2d 492 (3d Dist. 1980).

Regarding Count I, the discharge monitoring reports (C. Group Exh. 2) required by law to be filed by Moline were not rebutted and show that Moline has violated its permit conditions and Section 12(f) of the Act by discharging contaminants into the environment. Violations were between April 1, 1979 and December 30, 1982, inclusive, for BOD_5, TSS, fecal coliform and Cl_2. This was a 45 month period. There were no BOD_5 violations during 7/79, 8/79, 10/79, 8/82, 9/82, 10/82 and 11/82. There were no TSS violations during 5/82, 8/82, 10/82 and 11/82. The fecal coliform bacteria limitation was not violated during the following thirteen months: 4/79, 7/79, 10/79, 12/79, 3/80, 4/80, 5/80, 6/80, 2/81, 2/82, 4/82, 6/82 and 11/82. Likewise the Cl_2 limitation was not violated during the following eleven months: 12/79, 2/80, 4/80, 7/80, 11/80, 7/81, 5/82, 6/82, 7/82, 9/82 and 11/82. In summary, BOD_5 was violated 38 months, TSS 41 months, fecal coliform 32 months, and Cl_2 34 months.

As for Counts II and III, Moline attacks the capability, credibility, and credentials of the Agency investigator (Resp. Brief 25, 26). The Board notes that observation is sufficient to determine the violations alleged in this case. The investigator's experience in the field certainly qualified him to comment on those matters for which he testified. The eyewitness testimony (R. 40-68) of the investigator as to the visits and inspections throughout a three year period coupled with the photographs of some of those visits is unrebutted testimony that Moline violated the regulations as charged in Counts II and III. Supporting photographs include C. Group Exh. 6 #3, C. Group Exh. 7 #1 and #4, C. Group Exh. 8 #1 for color, turbidity and sludge solids violations. The following twelve days of violations have been proven for Count II: 6/13/79, 6/29/79, 12/5/79, 12/11/79, 6/18/80, 6/25/80, 7/30/81, 9/23/81, 11/12/81, 2/9/82, 4/15/82 and 6/23/82. Supporting photographs for water quality violations of scum, foam, and discoloration include C. Group Exh. 7 #1 and C. Group Exh. 8 #2. The following five-days of violations have been proven for Count III: 12/5/79, 12/11/79, 9/23/81, 11/12/81 and 2/2/82.

Regarding the alleged operating and maintenance violations in Count IV, the Agency investigator testified that the North Slope was designed to accept sludge solids from the municipal water filtration plant (R. 69). Moline's Superintendent for Water Pollution Control testified that the North Slope became operational in 1978. In March, 1979 it began to receive sludge solids from the filtration plant and after six weeks, it became apparent that sludge transportation away from the facility would be critically necessary (R. 195).

The Agency investigator visited the North Slope on December 21, 1978 and again on June 12, 13, 28, 29, 1979 and found the primary and secondary clarifiers, the chlorine contact and stormwater settling tanks were discharging excessive amounts of sludge (R. 32-35). Additionally, the sludge thickener and the vacuum filter were not in operation (R. 35, 39-40). On December 5, 1979 the investigator found the primary clarifier, one contact tank, and the north secondary clarifier inoperable. Two of the four stormwater tanks were out (R. 45-46). Photographs in C. Group Exh. 7 and transcript pages 48-49 support the findings of this visit. On June 18, 1980 the investigator found excess mixed liquor in the activated sludge, flow unevenly split between the two secondary clarifiers, sludge being discharged from the south secondary clarifier, and bad color in the activated sludge/secondary clarifiers (R. 52, 53). On June 25, 1980 as on June 18 the investigator found excessive sludge in the treatment units and the final effluent was laced with sludge and a gray-brown turbid color (R. 55, 56). The investigator testified one year later that on July 30, 1981 sludge was still being discharged from the treatment units and being recycled to the head of the plant (R. 58). The results were the same on his November 12, 1981 visit (R. 61). On February 2, 1982 the investigator found that the mechanical operation of the plant was almost halted. Flow to the primary clarifier was restricted because of excessive solids jamming the collector mechanisms of the various treatment units (R. 62, 63). On an April 15, 1982 visit there was some improvement - solids were 6,000 mg/l in the contact tank and 13,000 mg/l in the reaeration tank. Moline had the vacuum operating at two shifts/day and had hired an additional truck and driver to haul sludge away (65-67). A return visit on June 23, 1982 found elevated sludge levels with 13,000 mg/l solids in the contact tank and 26,000 mg/l in the reaeration tank. This elevation is corroborated by the DMR's. The Agency witness testified that plant operating records showed that only 8½ truckloads of sludge per day were hauled away in June compared with 10 truckloads per day in April (R. 67-69). Moline claimed that no reduction was made (R. 222). The record supports the Agency on this point.

As to Count IV, Moline called as a witness the manager of the Agency's Water Permit section, a Moline Superintendent, and two consultants. Moline argued that it complied with its NPDES permit as reasonably as possible, adequately, and as efficiently as possible (Resp. Brief 28). These arguments lack merit based on the evidence previously discussed. The Agency has met their burden as to Count IV and the Board finds that Moline has violated its NPDES permit, Sections 12(f) and 309.102 for thirteen days: 12/21/78, 6/12/79, 6/13/79, 6/28/79, 6/29/79, 12/5/79, 6/18/80, 7/30/81, 11/12/81, 2/2/82, 4/15/82 and 6/23/82.

Regarding the violations charged in Count V, the Agency has not proved these allegations by a preponderance of the evidence and therefore no violation is found (See Preliminary Issues, p. 2, supra).

Regarding the sewer cleaning Counts VI, VII, and VIII, the Agency investigator testified that on January 29, 1983, based on an anonymous phone call, he visited Moline's Sewer Maintenance Department facilities located at 39th Street and River Drive. There he observed two Moline employees dumping sewer cleanings into a storm sewer. A City of Moline pick-up truck with license M1464 was parked there. The investigator also stated that the cleanings were black, had a septic sewage odor and a strong chemical solvent odor (R. 90-102). One employee testified that he and another employee did discharge sewer cleanings into manhole #1 (See C. Exh. 10) on January 20, 1083 and that they were ordered to do it by their supervisor (R. 137-139). Photographs in C. Group Exh. 11 support the investigator. The investigator testified further that on the same day at 3:45 p.m. he observed a fifty foot long plume of black liquid along the south shore line of the Mississippi River (R. 98-100).

The Board finds that by discharging the sewer cleanings into a storm sewer, Moline violated the regulations charged in Counts VI, VII and VIII, specifically Sections 12(a) and (f) of the Act: caused, threatened, or allowed the discharge of a contaminant into the waters of the state. Sections 302.403 and 304.106 were violated because of the visible color and odor of the effluent.

Aggravating/Mitigating Factors

Once violations are found, aggravating and mitigating factors are scrutinized. A number of aggravating factors add to the seriousness of the violations in this case. The extent and duration of the violations is an aggravating factor itself. TSS was discharged by a factor of twelve to twenty times over the permit limit. Fecal coliform bacteria was discharged four to eight times over the limit, with instances of 1,070 and 565 times the limit (C. Group Exh. 2). Violations persisted for three years. Moline waited until "the eve of enforcement" to comply with the Act and Board regulations. An enforcement notice letter was mailed to Moline on September 15, 1982 and Moline was in compliance in Ocotober, 1982 (C. Exh. 3; Agency Brief 32).

Another aggravating factor is the amount of financial savings realized by Moline by failing to haul adequate amounts of sludge from the plant. Complainant's Exhibit 9 computes the amount of sludge by subtracting the quantity of TSS that could be legally discharged during the 42 months of TSS violations from the quantity that was discharged. The quantity of TSS discharged in excess of legal limits was calculated by the Agency as 10,374,577 lbs. between April 1979 and September 1982 (C. Exh. 9, Agency Brief 33).

Moline's own figures evince a higher amount of excess TSS discharge. Based on Respondent's fourth response to complainant's second set of interrogatories, Moline must remove 45,000 dry pounds of sludge per day on an annual average from North slope to prevent overloading the facility with solids (C. Exh. 5). Between April 1979 through September 1982 this would amount to 57,487,500 lbs. that should have been removed at a cost of $3,050,943.75 (Id., Respondent's second response to complainant's second request for admissions; Agency Brief at 34, 35). According to Respondent's third response to complainant's second request for admissions, 32,554,000 lbs. of TSS were removed at a cost of $1,699,040 (C. Exh. 5). The difference is 24,933,500 lbs. of TSS discharged in excess of the legal limits. The Agency calculated that Moline avoided costs of $1,351,903.75 by failing to remove, transport, and dispose the quantities of sludge in excess of the legal limitations (Id.).

First, Moline asserts that the conduct of the parties was a mitigating factor. This contractual issue was discussed with the preliminary issues. The conduct of the parties herein was not a mitigating factor. Moline had an affirmative duty to correct deficiencies at the plant in order to comply with the legal limitations and failed in its duty. In fact, Moline never even petitioned the Board for a variance from the legal limitations.

Second, Moline asserts that its improvement efforts were mitigating factors. These efforts included purchasing a new truck2/ in February 1980 (R. 197) and additional hoppers sometime in 1981 (R. 204), prioritizing truck repairs in 1981 (Id.), installing truck tire shields (Id.), hiring a contract hauler (R. 204-5) and obtaining extra landfill hours in late summer 1982 (R. 225). In addition Moline spent $100,000 to construct a sludge pad, purchase a tractor loader and initiate conveyor modification in 1982 (R. 206).

Moline knew at least by May, 1979, if not sooner, that sludge hauling would be critical to plant operation (R. 195-6), yet it makes the weak assertion that debugging and other problems prevented transportation from being identified as the "weakest part of the operation" until September, 1980 (R. 197-200). This case presents a very simple problem. If sufficient solids are not removed from the treatment plant as sludge, that material will exit with the effluent causing permit violations. Removing adequate sludge costs money but allows compliance. Inadequate sludge removal saves money but causes violations. Moline's multi- year effort to "identify" the problem is at odds with the simplicity of the problem. Moline put off solving the plant's problems until threatened with enforcement, and then quickly came into compliance. Moline's late compliance and lethargic compliance efforts are in no way outweighed by the alleged mitigating factors. The Board holds that Moline knew that its transportation and sludge hauling was inadequate by May of 1979, could have corrected the associated problems within one year, and had the financial resources to do so given the fact that it eventually came into compliance using its own funds.

Third, Moline asserts that there was a lack of environmental harm from its discharges and that this is a mitigating factor. The Board must weigh the § 33(c) factors in an enforcement action when imposing penalties. Processing and Books, Inc., et al. v. PCB, et al., 64 Ill. 2d 68 (1976); Southern Illinois Asphalt, et al. v. PCB, et al., 60 Ill. 2d 204, 326 N.E.2d 406 (1975); Mystik Tape v. PCB, et al., 60 Ill. 2d 330, 328 N.E.2d 5 (1975). The Board must look to the reasonableness of the discharge. Moline's expert testified that according to his study of June 1983, no environmental harm occurred to the receiving stream. In fact, Moline argues that their discharges had a benefit (Resp. Brief, 22). The argument is twofold: (1) that taking sludge that was formerly discharged into the river from the water purification plant and transferring it to North Slope for treatment reduced the amount of sludge going into the river; and (2) that the elevated organic content downstream was beneficial

2/As early as April, 1979, the City petitioned the Agency for a grant for purchase of an additional truck (R. at 246). This was denied in August or September and the City finally obtained one for $60,000 in February of 1980.

for the benthic organisms, raising the productivity of Moline's argument under (1), Moline assumes that all the sludge from the purification plant was effectively removed from the North Slope, transported and disposed. The record shows otherwise. Up to twenty-five million pounds of sludge were discharged. In fact, Moline argues that discharging the sludge from the water filtration plant was one of its options (Resp. Brief, 19, ftn. 1.) The water filtration plant, however, must also meet the applicable water standards. As for (2), testimony on both sides showed that the discharge point was in an area of swift water and that significant organic deposition was not to be expected at that point. Even though there was some deposition downstream there is no evidence of an environmental benefit. Moline's argument is not supported by the record.

The objective of Congress in enacting the Clean Water Act and the NPDES program was to improve the quality of the nation's waterways. This objective likewise carries over to the State Act and the Board's rules and regulations (Section 11 of the Act). The fact that the evidence did not show environmental harm at the outfall is not the issue. The excessively discharged contaminants did adversely impact the riverine environment and the health, safety and general welfare of the people under Sections 11, 12 and 33(c) of the Act. The evidence shows enormous amounts of contaminants discharged over a substantial time period. The Congress and the Illinois General Assembly have determined that discharges over the legal limits as in this case do harm the environment and are threats to the health, safety and welfare of the people. For the Board to hold that there was no adverse environmental impact whatsoever, or an environmental benefit as Moline alleges, would be a travesty. If Moline's arguments are accepted there would remain no reason for controlling similar discharges by other cities along major rivers. The result would be a significant attack on the public's right to use and enjoy the waters and contiguous properties of the state. The effluent standards are based on technological achievability. A violation is not excused because a discharger has demonstrated, or tried to demonstrate "after the fact", that it has not used up the assimilative capacity of its segment of the receiving waters. The Board does not have to look for evidence of a fish kill or other signs of degradation. The water quality standards are an enforceable benchmark, not an invitation to abandon the point source effluent standards control strategy for improving water quality.

Another potential mitigating factor is the suitability of the pollution source to the surrounding area under § 33(c). There is no doubt that this facility is needed, but it is needed in an effective operating condition. There is no amount of mitigation here as there is none with the last enumerated factor of Section 33(c)--that of technical practicability and economic reasonableness. The record shows Moline had the means to come into compliance long before it did in October 1982.

There are other Section 33(c) factors for the Board to consider in determining the reasonableness of the discharge. The economic and social value of the North Slope, a publicly owned sewage treatment plant, must be addressed. This value is based on its capacity to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (Clean Water Act, 33 U.S.C. § 1251(a)). As the Board has previously stated, a treatment plant's social and economic value is reduced by inadequate maintenance and operation. IEPA v. City of Carrollton, 47 PCB 405, 411 (PCB 81-145, 1982). The North Slope plant was built with $3,000,000 of public funds. Moline inadequately operated and maintained the plant and only complied with the NPDES permit and the regulations on the eve of enforcement. Moline accepted construction grant money and then failed to discharge its duty to properly run the plant. The Board does not find the social and economic value of the improperly operated North Slope plant as a mitigating factor herein.

Moline asserts that it is important that the Board note that Moline supplied the DMRs which show that it violated its permit. The fact that Moline supplied these documents is supposed to be taken as a sign of good faith (Resp. Reply Brief, 2 and 24). The Board notes that Moline did in fact supply the DMRs, and that Moline was required to do so by law (35 Ill. Adm. Code 305.102).

In enforcement cases the Board may award a civil penalty if it is necessary to aid in the enforcement of the Act and upon consideration of the § 33(c) factors above; punitive considerations are secondary. Southern Illinois Asphalt, Mystik Tape, supra; Wasteland, Inc., et al., v. IPCB and IEPA, 118 Ill. App.3d 1041 (3d Dist. 1983); Allaert Rendering, supra. The Board is vested with broad discretion in imposing this penalty. Marblehead Lime Co. v. PCB, 42 Ill. App.3d 116 (1st Dist. 1976). The severity of the penalty should bear some relationship to the seriousness of the infraction or conduct. Southern Illinois Asphalt, supra.

The penalties imposed in Southern and the consolidated case Airtex were invalidated because the records showed that the violations had ceased long before the Agency brought an enforcement action (Id. at 8, slip. op.). Southern had inadvertently failed to obtain a permit and had in good faith relied upon its supplier. Airtex had diligently tried to comply. The record did not indicate that Airtex was dilatory or recalcitrant.

However, Moline finally complied only on the eve of enforcement, seemingly so it could claim it was in compliance and that no penalty was justified. The violations in this case were largely caused by the buildup of solids. The record shows that correction of this problem could have been accomplished at any time by improving sludge handling and removing sludge from the plant. It was both technically and economically feasible for Moline to correct this problem prior to Spring of 1980. The record shows that Moline was dilatory and recalcitrant.

In imposing civil penalties in enforcement cases, the Board will reasonably total the amount allowed by the Act where it is feasible to do so. For a violation of § 12(a), § 42(a) of the Act allows the imposition of $10,000 per violation plus $1,000 for each day the violation continues. The imposition of $10,000 per day for violation of NPDES permit conditions or § 12(f) of the Act is allowed by § 41(b) notwithstanding the allowable penalties in § 42(a).

The following chart lists each count, the law(s) violated, the time period involved, the allowable penalty pursuant to Section 42 of the Act for each violation, and a total of those penalties.

In ruling on a motion for summary judgment in U.S. v. Amoco Oil Company, 580 F. Supp. 1042, 1050 (W.D. Missouri, 1984), a federal district judge held that

> I conclude, accordingly, that a "violation", as that term is used in § 1319(d), clearly may be something which is measured in more than a single day's period of time. That being so, I also conclude that where effluent limitations are set on some basis other than a daily limit - that is, for example, where they are set as a weekly maximum limit, or a weekly average limit, or a monthly maximum or monthly average limit, etc. - a "violation" necessarily encompasses all the days involved in the time period covered by the limitation. Thus, for example, where effluent limits are set on a "monthly average" basis, a "violation" of that limit would be a violation covering and including all of the 30 days of that monthly period, and a civil penalty "not to exceed $10,000" could be imposed for each of those 30 days.

As Section 42 of the state Act parallels federal subsection 1319(d) in substance, the Board adopts the Amoco reasoning. Therefore, where a monthly average violation occurred, a penalty may be imposed for each day of that month.

Count I		Penalty
-NPDES, § 309.102 and § 12(f) viol. from 4/1/79 through 12/30/82:		
BOD_5	$10,000/day of viol. x (45-7) mo. x 30 =	$ 11,400,000

TSS	\$10,000/day of viol. (45-4) mo. x 30	=	12,300,000
Fecal Coliform	\$10,000/day of viol. (45-13) mo. x 30	=	9,600,000
Cl_2	\$10,000/day of viol. (45-11) mo. x 30	=	10,200,000
		Sum	\$43,500,000

Count II: color, turbidity, sludge solids
-§ 12(a) and § 304.106 viol. 6/12/79 through
12/30/82

\$10,000/violation		\$ 10,000
\$ 1,000/day (12 days)		12,000
	Sum	\$ 22,000

Count III: floating debris, unnatural color
-§ 12(a) and § 302.403 viol. 12/11/79 through
12/30/82

\$10,000/violation		\$ 10,000
\$ 1,000/day (5 days)		5,000
	Sum	\$ 15,000

Count IV: inefficient operation, inadequate staff
-NPDES permit, § 309.102 and § 12(f) viol.
4/1/79 through 12/30/82

\$10,000/day of viol. (13 days)		\$ 130,000
	Sum	\$ 130,000

Count V: failure to submit NON's - § 12(f)

no violation	-0-

Count VI:
-§ 12(f) viol., discharge with no NPDES permit

\$10,000/day of viol. (1 day)		\$ 10,000
	Sum	\$ 10,000

Count VII:
-§ 12(f) and § 304.106 viol.; discharge sludge solids, unnatural color and odor into storm drains

\$10,000/day of viol. (1 day)		\$ 10,000
	Sum	\$ 10,000

Count VIII:
-§ 12(a) and § 302.403 viol.; discharge sludge, debris, odor and unnatural color from storm drains into Mississippi River

$10,000/viol. (1 day)		$ 10,000
	Sum	$ 10,000
	Total	$43,697,000

Given that Moline avoided costs of over $1.3 million by failing to properly operate and maintain the North Slope Plant, the Board must assess a penalty. Furthermore, the imposition of a miniscule fine in the nature of a "slap on the wrist" that could easily be hidden in an operating budget could be viewed as rewarding Moline's actions. A Moline witness testified that increased expenses at the treatment plant was a major factor in raising rates by 165 percent in 1983 (R. 209). Timely compliance would have required raising them sooner. Other cities have in good faith spent their taxpayers' money to operate treatment plants properly. Cities and sanitary districts must not be led to believe they can reduce their expenditures by improper operation.3/ By providing fines of up to $10,000 per day of violation, Congress and the General Assembly clearly signaled their intent that NPDES permit violations be taken seriously and that statutory penalties be sufficiently large to remove any economic incentive for non-compliance. The interests of fair play, the integrity of the State's pollution control regulations and the purposes of the Act demand that a substantial fine be imposed.

On the other hand, the Board does not desire to set a fine so high as to cause Moline hardship. A fine approaching the potential allowable penalty under the law is unnecessary to serve the purpose of the Act. The projected 1982-83 operating budget of the North Slope facility was $1,016,341 (C. Exh. 5). This is less than the costs Moline avoided by violating the regulations and should once again emphasize the monetary advantage Moline realized during its years of violations.

The Board holds that Moline shall be fined $90,000. This penalty amount is a sufficient percentage of the economic savings realized by Moline and will deter future violations of this type. The Board will not impose a fine for Counts VI through VIII. This recognizes the fact that Moline took prompt and

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3/ The record shows that the Moline City Council through its aldermen, knew of the WWTP situation. Some aldermen flew to Duluth, Minnesota on October 30, 1981 to observe land application of sludge (R. 261-2). A few aldermen attended an Agency meeting in May 1982 (R. 207). One witness for respondent was evasive when asked whether the Sewer Maintenance Department had ever asked the City Council for additional appropriations for the North Slope since 1979 and whether the City Council ever provided additional funds (R. 224-5).

effective action against those responsible for these violations: two employees received reprimands, two received suspensions without pay, and the supervisor of the Sewer Maintenance Division of the Water Pollution Control Department was discharged (R. 213). This was the entire work force of that division (R. 209).

Although WWTP's are vitally needed in this society, they are needed in a viable, efficient, operative state. The residents of Moline and those people downstream are afforded a right to a healthy environment pursuant to Article XI of the Constitution of the State of Illinois. However, there is a complementary policy that those responsible for pollution pay for it. The City of Moline is responsible for its pollution. The cost of this fine will most probably be passed on to the system users in the form of higher sewer taxes and fees. This is as it should be since these same users avoided past costs of over $1.3 million due to noncompliance. Even if one were to argue that the Agency's computations are excessive, the actual penalty being imposed is far less than the economic savings that could be computed.

In summary, the Board finds that the City of Moline has violated its NPDES permit, 35 Ill. Adm. Code 302.403, 304.106, and 309.102, and Sections 12(a) and 12(f) of the Act as alleged in Counts I, II, III, IV, VI, VII and VIII. The City of Moline will be ordered to cease and desist from further violations and to pay a penalty of $90,000 to aid in the enforcement of the Act.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

It is the Order of the Illinois Pollution Control Board that:

1. The Respondent, the City of Moline, has violated the conditions of its NPDES permit, 35 Ill. Adm. Code 302.403, 304.106 and 309.102, and Sections 12(a) and 12(f) of the Illinois Environmental Protection Act.

2. By December 1, 1985, the Respondent, City of Moline, shall pay a penalty of $90,000 by certified check or money order payable to the State of Illinois, which is to be sent to the following:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, IL 62706

3. The Respondent, City of Moline, shall cease and desist from further violations.

4. The Hearing Officer's ruling admitting Respondent's Exhibit 8 into evidence is hereby reversed.

5. The Hearing Officer's ruling admitting Respondent's Exhibit 9 into evidence is hereby reversed.

6. The Hearing Officer rulings to deny admission to the following are hereby affirmed:

a) Testimony of Agency witness Roger Callaway;

b) The Agency investigator's statement at page 99 of the transcript: "It appeared ... discharged."

c) Photograph #3 of Complainant's Group Exhibit 11;

7. The Hearing Officer's ruling to deny admission to Complainant's Exhibit 12 for identification is affirmed and the corresponding offer of proof is denied.

8. The Hearing Officer's ruling to deny the motion to amend the complaint to include January 6, 1983 in Counts VI, VII, VIII is hereby affirmed and the corresponding offer of proof is denied.

9. Respondent's Exhibits 4, 5 and 6 are admitted as evidence only to support the validity of the joint study.

10. The testimony of James Huff is admitted as expert testimony.

IT IS SO ORDERED.

Board Member W.J. Nega concurred.
Board Member J.D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of September, 1984 by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board