

We now have received motions from both the City of Fairfield and Airtex to stay parts of the Board's order. In a letter directed to the Board the City requests that the Board stay paragraph 4 of the order because the City cannot pay the penalty of \$1100 imposed by the Board. Its reason is that funds were not appropriated for this purpose for this fiscal year, thus funds are not available to pay the penalty. If indeed the City has no funds available at the present time as it claims, we, of course, would stay the order until the funds could be budgeted in the next fiscal year. However, there must be a myriad of other situations where a City must expend funds unexpectedly, and it would seem that a contingency fund of some kind would be available for this purpose. Also, no other municipality has raised this issue with the Board. Therefore, before staying the payment of the funds until the next fiscal year, we would ask that the Agency submit a recommendation to the Board, after review of the contention by the City as to whether there are funds available to pay the penalty now. Based upon that recommendation and upon any additional evidence the City wishes to present on this subject, we will make a decision on whether to stay the payment of the penalty by the City.

Airtex's motion raises two points: first, it asks that we stay that part of the order requiring the payment of the penalty pending appeal of the Board's original order, and second, that we strike that part of the order which requires Airtex to "cease and desist" from discharging cyanide compounds generated in its operations. As to the first issue, we have consistently held that we will grant a stay of an order requiring the payment of a money penalty, pending appeal of the Board's order. But such a stay has been granted on the condition that the person against whom the order is directed files a bond with the Board which assures the payment of the money penalty plus 5% interest on the money from the date of the entry of the Board's order, if the Board's order requiring the person to pay is upheld on appeal. See Molex v. EPA, 71-200, Opinion dated Jan. 31, 1972 and Agrico Chemical Co. v. EPA, 71-211, Opinion dated Jan. 31, 1972. We will follow that Rule in this case as well.

The second issue raised by Airtex related to the "cease and desist" order entered by the Board against Airtex. See paragraph 1, Board's order dated Feb. 3, 1972. The major point made by Airtex is that relief in the nature of a "cease and desist" order was not sought by the Agency in this case, and as a result, the imposition of this kind of relief was really not before the Board. To understand this argument, a brief review of the issue is necessary.

The original complaint filed by the Agency alleged that "on and after July 1, 1970" Airtex caused cyanides and cyanogen compounds to escape to the Fairfield sewer system in violation of the Act and certain regulations promulgated thereunder. The complaint asked that money penalties be imposed against Airtex and asked for "such further relief that the Board deems necessary." Had the Agency not amended the complaint, the general prayer for relief that the Board deemed "necessary" would have been enough to give Airtex proper notice that a cease and desist order could have been entered against it. However, Agency, through its attorney, did amend the complaint on the date of the hearing in two ways. First, it limited the date of violations to May 4 and May 14, 1971 and second, it removed its request that a "cease and desist" order be entered against Airtex. The specific request was made in the Agency's opening statement when the Assistant Attorney General, representing the Agency said:

"...I would at this time make a motion to amend the complaint that had been filed herein to state that the violations that are in question here were violations that occurred on or about May 4, 1971 and May 14, 1971 solely. It is not meant to be a continuous violation for which we would be asking a cease and desist order or anything of this nature." (emphasis supplied) see record, page 5.

The hearing officer properly granted the Agency's motion to amend the complaint, and as of that time the sole issue in the case revolved around violations of the law by Airtex on May 4 and May 14. The issue of a continuous violation was not then a subject for the Board's decision and order. Thus, Airtex properly points out that the Board should not have entered a cease and desist order against Airtex. To enter a cease and desist order after it was dropped from the case violates the traditional legal principle of giving the respondents adequate notice of the complaint against them. It can be amended that the respondent did not enter proof in this point because he felt it was no longer an issue in the case.

This position is consistent with the fact that Airtex stated that the plating process which was the source of the contaminants alleged to have caused water pollution was closed down and no longer operating. We will, therefore, expunge paragraph 1 of the order of the Board entered on February 3, 1972.

Mr. Dumelle dissents in part.

Upon motion of the Respondents, and consideration of the arguments and the record, the Board hereby enters the following order:

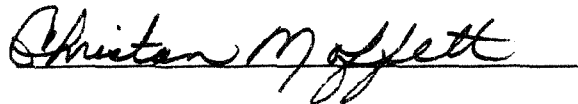
O R D E R

1. The Agency shall determine upon investigation within 15 days whether the City of Fairfield is able to pay the \$1100 money penalty assessed against it from the City's funds in the current fiscal year. Upon receipt of such information, and any additional information from the City of Fairfield within the same 15 day period, the Board shall make such further order as it deems necessary.

2. Paragraph 3 of the order of the Board entered in this cause on February 3, 1972 is hereby stayed pending appeal of the Board's decision provided that within 15 days from this date Airtex files with the Agency a surety Bond guaranteeing payment of the penalty with 5% interest if the Board's order directing the payment of a penalty is upheld on appeal.

3. Paragraph 1 of the order of the Board in this cause is hereby expunged ab initio.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 14th day of March, 1972, by a vote of 3-1.


Christan Moffett