

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF ROCK ISLAND,)	
)	
Petitioner,)	
)	
v.)	PCB 98-164
)	(Variance-Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

POST HEARING BRIEF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Respondent, the Illinois Environmental Protection Agency ("Illinois EPA") by one of its attorneys, Richard C. Warrington Jr., hereby files its Post Hearing Brief.

I. INTRODUCTION

1. This variance petition concerns the operation of the main sewage treatment plant ("Plant") of the City of Rock Island ("City" or "Petitioner"). The City has requested a variance to grant such relief as may be necessary to allow it the necessary time to construct modifications to the Plant to increase the design maximum flow ("DMF") from 12 million gallons per day ("MGD") to 16 MGD while remaining in compliance during design and construction period with the Exception previously approved by the Board to the rule governing the treatment of overflows and bypasses" (Amended Petition, p. 2)¹ Because the requested variance seeks relief from a 16 MGD, DMF plant capacity requirement that was requested in 1970 and permitted as such in 1971, this petition and its relief are untimely.

¹ References to the CSO Exception Order of May 9, 1986 are to Exception p.x; to the Amended Petition are to Amended Petition, p. x; to the Amended Recommendation are to Amended recommendation p. x; to the transcript of the variance hearing are to Tr. 98-164 p. x; to the transcript of the permit appeal hearing are to Tr. 00-73 p. x; and

2. Moreover, the City and its engineers were aware of a DMF capacity problem in drafting the Combined Sewer Overflow exception petition from studies in 1982 and 1984 and the City committed to improvements to allow operation of the plant at the 16 MGD, DMF level before the Illinois Pollution Control Board ("Illinois PCB"). (Exception p. 4)

3. The Illinois EPA believes that a fourteen year retroactive variance from the City's commitment to treat 16 MGD before bypassing is not justified by the law or this record. The Illinois EPA incorporates its Amended Recommendation of November 2, 1999, with its Exhibits and recommendation to DENY the requested variance into this Post Hearing Brief.

II. STANDARD OF REVIEW

4. The standard of review for the Illinois PCB to consider in variance petitions was given by the legislature as "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship". 415 ILCS 5/35(a) (1998) This standard was incorporated by the Illinois PCB in their own regulations at 35 Ill. Adm. Code 104.160(f) (1985). Compliance has not been shown by this record to be arbitrary or a hardship to the City or disproportionate to the environmental benefits sought by the regulations.

5. Treatment of the full 16 MGD, DMF before bypassing the CSO flow is not an arbitrary requirement. The City specifically stated that the DMF of the plant to be constructed in the early 1970's was to be 16 MGD. (Line C-34, Exhibit O to the Amended Variance Recommendation, Tr. 98-164 p. 89) Mr. McSwiggin, called as an adverse witness by the City, testified that there was a reasonable possibility that the treatment plant improvements constructed in the early 1970's would have been capable of meeting secondary treatment limits at a maximum design flow rate of 16 MGD. (Tr. 98-164 p. 68) Moreover, although the City has argued that the

maximum practicable flow for this plant is under the DMF, Mr. McSwiggin testified that the maximum practicable flow could be above the DMF. (Tr. 98-164 p. 88)

6. Furthermore, the City argues that Mr. McSwiggin's testimony at Tr. 98-164 p. 69 confirms the ability of the City to downrate the plant to 12 MGD, DMF. In actuality, Mr. McSwiggin recognized that the ability of the City to now change the rating of the plant has been constrained by the Order of the Illinois PCB in the CSO Exception, PCB 85-214, and by the National Pollutant Discharge Elimination System ("NPDES") permit. (Tr. 98-164 p. 69, lines 17 and 18)

III. HARDSHIP

7. The City makes no serious claim that compliance with the CSO Exception is a hardship. Compliance with the Illinois PCB general standard for Combined Sewer Overflows was stated at \$55 million in 1985 as part of the CSO Exception proceeding. (Tr. 98-164 p. 36) and simply extrapolated to \$100 million in year 2000 dollars. (Tr. 88-164 p. 36) However, the issue in this variance is the cost to comply with the CSO Exception of only bypassing after 16 MGD, DMF is given full treatment. The cost of the 1985 improvements was only a little over \$ 100 thousand dollars (Petition Attachment 2) Obviously, the 1985 improvements were not sufficient to eliminate bypassing below the specified DMF and the City did not notice that bypassing still occurred. The current construction, also represented to be sufficient to treat 16 MGD, DMF is projected to cost approximately \$ 3 million dollars in current dollars. It can be assumed that if this construction was undertaken and completed when it was necessary to treat 16 MGD, DMF in 1985, the cost would have been less. The City has made no proof that these costs would be a financial hardship to the City, indeed the City has made no proof of any financial burden.

8. In addition to this delay, the Illinois PCB should not grant a variance retroactively because the City itself contributed to the problem by failure to adequately assess the plant performance either before the CSO Petition or afterward.

9. Mr. Hawes, originally the City Engineer and now the Director of Public Works, testified that he participated in the drafting of the CSO Exception Petition. (Tr. 98-164 p. 18) However, he does not remember details concerning information used by the City's consulting firm to support the conclusions contained in the CSO Exception Petition. (Tr. 98-164 p. 51) The Illinois EPA would expect that a City Engineer should be familiar with the performance of a plant, including the flow rate at which it bypasses untreated sewage. Likewise, after the 1985 improvements, the City should have been aware before 1997 when it hired Mr. Huff that there was still a bottleneck at the plant. (Tr. 98-164 p. 102) The Illinois EPA maintains that any burden has been caused by the delay of the City.

III. ENVIRONMENTAL IMPACT

10. Although the Illinois EPA joined with the City in 1985 in stating that there would be minimal environmental impacts as a result of the CSO Exception, there is still the present problem of offensive conditions below the CSO outfall. The Illinois EPA documented these offensive conditions in a public area through the photographs taken on August 5, 1998, October 22, 1998, November 2, 1998 and August 24, 1999. (Tr. 98-164, Respondent's Exhibits 1 through 5)

11. These observations are corroborated by the City's Exhibit 14 to the Variance Hearing. This Exhibit provides a graphical representation of the debris collected occasionally by the City from areas upstream and downstream of the CSO outfall. (Tr. 98-164 p. 59) The Exhibit shows concentrations of sanitary debris downstream of the CSO outfall to be much higher than that

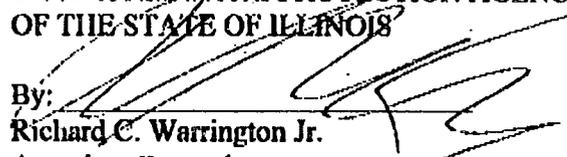
found upstream. (*Id.*)

IV. CONCLUSION

12. The record in this proceeding shows that the relief requested by the City of Rock Island is untimely, beyond the statutory duration limits for variance relief, without any justification for being granted retroactively, caused by the City's own delay and inattention, and not justified by the ongoing violations of the most basic water quality standard of having the state's waters free from floating debris. As stated in the Illinois EPA Amended Recommendation, a mistake does not provide a defense from compliance with an Order of the Illinois PCB. A mistake only acknowledged on the eve of federal enforcement calls into question the diligence of the City. To absolve the City of penalty liability without consideration of the factors set forth in Section 33(c) of the Environmental Protection Act, 415 ILCS 5/33(c) (1998) is an affront to the environmental control system enacted by the Illinois legislature. Therefore, the Illinois EPA continues to recommend that this variance petition be **DENIED**.

Respectfully submitted,

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By: 

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Date: June 7, 2000

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **POST HEARING BRIEF** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Ms. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St. Suite 11-500
Chicago, Illinois 60601
(By Facsimile as Ordered by the Hearing Officer on June 6, 2000)

Roy M. Harsch
Sheila H. Deely
Gardner, Carton & Douglas
Suite 3400 Quaker Tower
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Chicago, Illinois 60610-4795
(By Facsimile as Ordered by the Hearing Officer on June 6, 2000)

John Knittle, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601
(By Facsimile as Ordered by the Hearing Officer on June 6, 2000)

and telefaxing it from Springfield, Illinois on June 7, 2000 before the hour of 5:00 p. m..

Nancy J. D. Lamport

SUBSCRIBED AND SWORN TO BEFORE ME

this 7th day of June, 2000

[Signature]
Notary Public

G:\warrington\Rock Island
6/6/00

