ILLINOIS POLLUTION CONTROL BOARD
November 11, 1971

FLINTKOTE CO.	)	
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	)	
v.	)	# 71-68
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. Edward Benecki, for Flintkote Company

Mr. Delbert D. Haschemeyer, for the Environmental Protection Agency

Opinion and Order of the Board (by Mr. Currie):

Flintkote operates a felt mill in Mt. Carmel, at which pulpwood and waste paper are made into felt for ultimate manufacture into roofing materials. Waters used in the process accumulate considerable quantities of oxygen-demanding solid contaminants, the largest of which are removed by screening before the discharge to the Wabash River of that portion of the effluent (perhaps 1/3) which is not reused (R. 226-32). The discharge is quite considerable: The amended petition gives the results of sampling on March 3, 1971 as indicating a BOD of 583 parts per million, COD of 1,654, and suspended solids of 754, in an average flow of 350,000 gallons per day.

Rules and Regulations SWB-9, adopted in final form in 1968, prescribe a maximum BOD of 40 ppm and suspended solids of 45. The company concedes that "we have since 1968 known we were in violation of the standards" (R. 415). Flintkote was notified in 1968 that its deadline for compliance was July, 1970 (R. 408); we view this notification as in effect the grant of a variance allowing discharges in excess of regulation limits until July, 1970, on condition that the interim dates of the regulation for submission of plans 18 months in advance and the award of construction contracts 12 months in advance be met.

Preliminary talks on the subject of discharging company wastes to the City's sewers seem to have begun in early 1968, when the City told Flintkote it would "try to ascertain whether we could accept them" (R. 288). Flintkote advised the Sanitary Water Board that the City was studying the problem (R. 405) and hired a consultant whose October 1968 report stated that the company's waste was suitable for biological treatment but that "the tremendous hydraulic load and the contaminants in it would just make it almost impractical for the city to accept it without pretreatment."

Then, having decided that pretreatment and discharge to the City for final treatment was the answer, the company seems to have left the question of its compliance entirely up to the City for quite some time. As the General Manufacturing Manager testified, "then we have a gap in here. . . .Even before that from 6/21/68 until 11/4/70 no communication with any agency or governmental body" (R. 409). The Mayor testified that after his January letter promising to study the problem "I don't believe that we had any official meetings or anything like that during 1968" (R. 294). When the City got around to making its promised study is discussed below. It is clear that Flintkote did nothing until 1971 to stimulate the City to action. Moreover, the company concedes that it did not comply with the specific conditions of the Sanitary Water Board's letter setting its timetable with regard to the filing of periodic progress reports and pretreatment plans (R. 454).

On November 4, 1970, the Agency warned Flintkote that immediate action should be taken, since the discharge continued greatly in excess of regulation limits (R. 409). At that point serious negotiations with the City began, with an unsuccessful meeting in February 1971 and with the City's May 19 oral agreement in principle, confirmed by letter in June, to accept for treatment a flow of not over 500,000 gallons per day containing up to 864 ppm BOD and 960 ppm suspended solids (R. 412). At the time of the hearing in late September no contract had yet been signed, apparently because of a disagreement over the definition of surges that must be prevented by pretreatment (R. 417). Since then we have received a copy of an October 28 letter from the company to the Agency stating that, after adequate pretreatment is provided, the City has agreed to accept not over 3600 pounds per day of BOD and 4000 pounds per day of suspended solids, at flows not to exceed 425 gpm, 25,000 gal/hr, and 500,000 gpd.

But the signing of a contract will by no means put an end to Flintkote's unlawful discharge, for the City is in no position to take Flintkote's wastes in the near future. The present municipal treatment plant provides only primary treatment, although SWB-9 required secondary to be provided by July 1, 1970, a fact of which the City was admittedly notified in September, 1967 (R. 249A-249B). The City hired a consultant (the same firm hired by Flintkote) to prepare a study of what was needed to comply with SWB-9; this study, requested before discussions with Flintkote and not providing for treating the company's waste, was received in April 1968 and recommended that a million-dollar secondary plant be built (R. 300). Upon receiving this report the City admittedly put it on the shelf; without so much as asking the Sanitary Water Board for an extension or other variance, the City decided that "We couldn't in good conscience try to sell that program to the residents of this city" because City officials believed the referendum for necessary bonds would not pass (R. 254). "So, frankly," the Mayor testified, "we didn't take any action as far as meeting the July 1, 1970 date" (R. 302).

The City next appeared in January, 1971, when it was sent a letter by the Agency threatening to bring it before the Board for failure to comply with SWB-9 (R. 257). Only then, and after the February meeting with Flintkote noted above, did the City for the first time authorize a study of what facilities would be needed to enable the City to accept and treat Flintkote's wastes, the study it had agreed to make in January, 1968 (R. 286-87). This study recommended a larger plant for a cost of $2,000,000. The consultant testified that if design began October 1 of this year, it would take about five months; that obtaining permits would require up to 90 days thereafter, advertising for bids and awarding contracts two more months, and construction 18 to 24 months more, so that compliance with the July 1970 requirements would be achieved some time between February and August of 1974 (R. 315-19).

In this unhappy situation the issue before us is an unfortunately narrow one: whether or not to grant Flintkote a further variance, as requested in its petition of March 31, 1971 and later amended, to allow a continued discharge with impunity during the construction of the City's secondary plant. The question of money penalties is not before us , for the Agency flatly stated in the pre-hearing conference that if such matters arose a separate proceeding would be filed (R. 24-25). The question of the City's compliance with its own schedule is likewise not before us, since the hearing officer denied the Agency's motion that the City should be made a party (R. 46). We think the motion should have been granted, since an order binding Flintkote alone would not assure that the company would meet its schedule, the bulk of the work having to be done by the City. But in light of our disposition of the case as a whole we think no purpose would be served by ordering the City made a party now.

The requested variance must be denied. A variance is a shield against prosecution; the record here indicates that Flintkote has unreasonably and inexcusably brought about a four-year delay in meeting its obligations under the pollution laws, and it is not entitled to be protected against prosecution with its risk of money penalties. In cases in which a petitioner has presented a tardy but otherwise adequate compliance program, we have on occasion granted a variance to the limited extent of approving the program for the future, either imposing as a condition of the variance the requirement that penalties be paid for past violations (e.g., Marquette Cement Co. v. EPA, # 70-23, Jan. 6, 1971), or reserving the question of such penalties for a separate proceeding (Chicago-Dubuque Foundry Co. v. EPA, # 71-309, October 14, 1971). In the present case, however, this course is precluded by the fact that the company has not yet presented a satisfactory compliance program.

The program is deficient in several respects. First, there is no assurance, because the City was not a party, that it will perform its obligations even now; an order binding Flintkote alone would leave open the possibility of a defense by the company in the event that the City's plant is not ready even in 1974. Second, it is not at all clear from the record that the City can adequately treat Flintkote's wastes at the level at which it proposes to accept them. The consultant made clear that 1968 BOD and suspended

solids levels of 642 and 900 ppm respectively must be reduced before the City could handle them, for they are much greater than ordinary sewage and their contribution about 1/3 of the total expected plant load (R. 320, 330-31, 445). Yet the City has agreed to accept up to 500,000 gpd at BOD of 864 and SS of 960, both of which are greater than the 1968 levels found objectionable (R. 335). We cannot tell from the October 28 letter that this problem has been surmounted. Third, while the company promises some pretreatment in order to eliminate surges that would tax the City beyond the limits agreed upon, its plans for pretreatment are entirely too vague. In the testimony there was no description of the type or size of the facilities to be provided, except that there might be some sort of retention pond and improved screening or other provision for trash collection (R. 449), and there was no schedule for designing, constructing, or completing them. The October 28 letter recites that a holding pond is to be installed to control surges and "to assist in settling some solids". The capacity of this pond is to be either 50,000 or 100,000 gallons, depending on which attachment one reads. But we have no indication as to whether this pond will be adequate to satisfy either the City, the Agency, or the Board, or as to when it is to be built. Fourth, we are not convinced that the best that can be done even today is to put up with the present discharge until some indefinite time in 1974. It is not clear why so much time is required for the City's work to be done; it is not clear that Flintkote could not do the job faster on its own (cf. GAF Corp., # 71-11, Supplementary Opinion September 16, 1971); it is not clear that the situation cannot be alleviated by the interim or permanent use of package treatment facilities or that interim relief might not be afforded by prompt construction of primary treatment or pretreatment facilities. Fifth, the arrangement seems to contemplate that the federal government will pay a fat portion of Flintkote's share of the proposed City plant, since Flintkote is to use 1/3 of the capacity while paying only $145,000 out of a total of two million (R. 269). Our reading of the federal regulations does not afford much cause for confidence in such a result, and the financing plans for the program therefore appear insufficient.

Thus Flintkote has submitted no adequate program on which we could base the grant of even that limited type of variance which leaves the petitioner open to possible penalties for past delays. Moreover, we think it would be inappropriate to separate the issues of program and of penalty in a case like this one, since penalties could conceivably be cumulative until the date of ultimate compliance.

The variance is denied. The Board will entertain additional proceedings based either upon further petitions by the company or by the City or upon such complaints as may be filed by the Agency.

There is much evidence, as we requested, on the issue of hardship if the plant were required to close. Today's order does

not close the plant; it merely refuses to grant a shield against prosecution and thus leaves the company in the same position it has been in since its compliance deadline passed. What sanctions the Board might impose can be determined only in further proceedings and in light of all relevant factors, including the hardship that a shutdown would inflict.

Flintkote's motion to keep confidential certain detailed cost and production figures only remotely relevant to the issue of pollution is granted on the company's evidence that disclosure could be competitively harmful.

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

I, Christian Moffett, Acting Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this ____ day of _____, 1971.