ILLINOIS POLLUTION CONTROL BOARD
November 14, 1972

BEARDSTOWN SANITARY DISTRICT	)	
	)	
v.	)	#72-232
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
CITY OF BEARDSTOWN	)	
	)	
v.	)	#72-264
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

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

The Beardstown Sanitary District operates a sewage treatment plant giving primary treatment and some degree of chlorination[1] to the domestic wastes of some 7,000 persons in and near Beardstown. The City of Beardstown owns a separate treatment facility consisting of lagoons providing a certain degree of treatment to oxygen-demanding wastes of about 40,000 population equivalents from the Oscar Mayer slaughterhouse at Beardstown. Although the District's petition does not state the regulations from which a variance is sought, both petitioners appear to seek variances until June, 1974 from the effluent standards of Rule 404(a) (PCB Regs., Ch. 3, Rule 404(a)), which requires BOD to be reduced

1. The Agency's uncontradicted evidence is that present chlorination is ineffective; feeding equipment is less than that required, there is no contact chamber to assure adequate retention to kill bacteria, and the fecal coliforms in the effluent are "about the same" as those in raw sewage (R. 267, 269; EPA Ex. 9). The District said only that it was chlorinating and believed it was meeting the standards (R. 185). It offered no supporting test data. The District has contracted to provide disinfection for the City too (R. 61, 173). Neither petitioner asks relief from the disinfection requirements, and the Agency has not filed a complaint. There is therefore nothing for us to do about bacteria in the present case, however inadequate the present treatment.

to 30 mg/l and suspended solids to 37 mg/l by July 1, 1972, or such earlier date as may have been specified in prior regulations. The District appears to request a similar extension of the July 1, 1972 date of Rule 602 for control of treatment plant bypasses. We deny both petitions for reasons given below.

The hope of both petitioners is to combine their efforts and to dispose of the effluents from both facilities on land for the irrigation of crops, obviating the need for additional treatment and terminating dry-weather discharges to the Illinois River (R. 175).

A preliminary study (City Ex. 10) convinces the petitioners' engineers that the land-disposal idea is worth pursuing (R. 55). An expert from the Illinois State Geological Survey, however, pointed out the extremely permeable nature of the soil at the proposed disposal site, noting that much of the wastewater applied to the ground would reach the water table without much diminution in mineral content "in essentially the same condition as when it was sprayed on the land" (R. 100). An expert from the Illinois State Water Survey said he believed nearby wells would be affected (R. 113). The City's consultant acknowledged that his study so far did not disclose relevant information with respect to lateral migration of water from the site and that further study was needed before the safety of the project could be assured (R. 81-82).

We cannot help feeling some reservations about a scheme for dumping inadequately treated sewage and slaughterhouse wastes[2] onto the ground with no protection against seepage of contaminants into either ground or surface waters. We note in contrast the careful precautions for control of leachate from solid waste disposal sites required in EPA v. Carlson, #71-243, 5 PCB ___ (Sept. 26, 1972), proposed by the operators in Elgin Jaycees v. Tri-County Landfill, Inc., #71-59, which is now pending before us, and proposed by the Agency and Institute in the pending revised landfill regulations, #R 72-5. Cf. also SEMCO, Inc. v. EPA, #72-364, now pending before us, as to precautions

2. The preliminary report notes that ordinarily secondary treatment is desirable before land disposal of effluent; says that one of the City's lagoons will be taken to provide some treatment beyond primary to the District effluent; that the City's effluent will thus receive less treatment than presently; that there will be no disinfection; and that expected effluent BOD and suspended solids levels will be 130 and 80 mg/l, respectively--hardly the equivalent of secondary treatment as defined in SWB-8. See City Ex. 10, pp. iii, 15-16. There is no adequate evidence to assure us against bacterial or viral contamination of groundwater, or nitrate pollution.

necessary in land disposal of sewage sludge. We note also that the cost of pumping the District's sewage to the site for land disposal without further treatment approximates the cost of secondary treatment (R. 225) and that the June 1974 compliance date is anything but firm (R. 57-58, 63-64). We think a great deal more proof must be offered before we or the Agency can give approval to any such proposal.

With respect to stormwater, it appears that the proposed land disposal scheme will not solve the problem (R. 228). Indeed the District makes no concrete proposal for stormwater control. The District complains that the Environmental Protection Agency has interpreted Rule 602, which the Agency concedes is substantially the same as prior regulations, to require primary treatment and chlorination of all stormwater flows in all cases, contrary to its earlier interpretation that only ten times the dry-weather flow need be so treated (R. 212-13). The District thinks this requirement would impose an unreasonable burden upon it but does not ask us to rule the Agency's interpretation wrong[3]

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3. The Agency's rigid interpretation is totally inconsistent with the language and intention of the rule, which deliberately leaves the Agency a good deal of discretion as to the degree of treatment required, beyond primary treatment and disinfection of ten times the dry-weather flow, to maintain adequate water quality without unreasonable cost in light of varying local situations. The blanket requirement imposed by EPA is precisely what we rejected in adopting the regulation, as a reading of the opinion accompanying the regulations will readily show. In the Matter of Effluent Criteria, #R 70-8, 3 PCB 755, 773-75 (March 7, 1972). The Agency should consider on its merits the adequacy of the proposed stormwater treatment facility to determine its effect upon water quality in recognition of the fact that the regulation contemplates there will be cases in which the cost of capturing and treating the highest flows may not be justified.

or to give it permission to construct a less costly facility.[4] Instead the District asks a year's time in which, if the Agency is correct, the "design may be revised or the storm water facility eliminated from the plans and specifications for the secondary treatment facility." (Amended Petition, p. 2). How the later course would cure the stormwater problem is not clear. We find a total absence of commitment to an adequate program of stormwater control.[5]

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4. The District's cost figures for giving complete stormwater treatment are a red herring. The District tells us it may cost a million dollars or more (R. 221), over three times the cost of the secondary plant, to build primary treatment facilities for the entire 50-mgd storm flow. There is no proof that this is a sensible way to approach the problem, much less the only or the least expensive way. We have elsewhere noted the practice of constructing retention ponds to capture large storm flows that can later be fed through treatment facilities of comparatively modest size. See In the Matter of Effluent Criteria, #R 70-8, 3 PCB 755, 773 (March 7, 1972); League of Women Voters v. North Shore Sanitary District, #70-7, 1 PCB 369, 379 (March 31, 1971). There was no proof here that this method could not be followed, only the cryptic suggestion that the idea had not been pursued because of the "prevailing winds" (R. 250-51). The practicability and cost of such facilities is a proper issue for the Agency to consider in assessing the quantity of stormwater for which treatment must be provided in a particular case under Rule 602.

5. A final issue requires clarification in this connection. There was repeated reference in the record to different stormwater standards that must be met now and in 1975 (E.g., R. 157-58). This is a misconception. The standard for both 1972 and 1975 compliance is phrased in identical language, to be applied by the Agency according to the facts. The different dates reflect the decision to allow more time for correction of overflows elsewhere in the sewer system than for bypasses at the treatment plant itself, because of more challenging logistic problems detailed in the rule-making record. See In the Matter of Effluent Criteria, #R 70-8 3 PCB 755, 773-75 (March 7, 1972).

Thus we find, with respect to both petitioners, that the proposed plan for compliance with the standards is inadequate to justify present approval. Normally an adequate program is requisite to the grant of a variance. See Chicago-Dubuque Foundry Co. v. EPA, #71-130, 2 PCB 65 (June 28, 1971); York Center v. EPA, #72-7, 3 PCB 485 (Jan. 17, 1972); Metropolitan Sanitary District v. EPA, #71-183, 3 PCB 57 (Nov. 11, 1971). The question remains whether we should grant additional time in which to make further study of the proposal without fear of money penalties. Cf. International Harvester Co. v. EPA, #72-321, 5 PCB ___ (October 24, 1972).

A variance is a shield against the possibility of penalties for failure to comply with the law or regulations. We cannot grant a complete shield if the failure to comply was inexcusable, for to do so would make every violation its own justification and completely frustrate enforcement. See,e.g., Decatur Sanitary District v. EPA, #71-37, 1 PCB 359 (March 22, 1971); Commonwealth Edison Co. v. EPA, #71-150, 5 PCB ___ (August 8, 1972). We must inquire as to the diligence of the District and of the City in attempting to comply with the standards here sought to be waived.

The City attempts to argue that there were no standards it was required to meet until the adoption of Rule 404(a) in March, 1972, so that it simply had no adequate time in which to construct the necessary facilities by the July 1972 deadline. This would be a persuasive argument if the premises underlying it were sound, see International Harvester Co. v. EPA, cited above, and cases there cited, but they are not. Rule 1.08 of Rules and Regulations SWB-8, (City Ex. 11) adopted by the Sanitary Water Board March 5, 1968 and effective April 1, 1968, provided as follows:

> 10. Treatment Requirements and Effluent Criteria. . . .
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> a. All municipal or industrial facilities for treatment of deoxygenating waste shall provide at least secondary biological treatment, or advanced waste treatment to reduce the organic pollution load of the treatment works effluent at the final treatment structure in accordance with effluent guidelines in paragraph 11. . . .
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> 11. Guidelines Regarding Range of Treatment
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> a. Secondary treatment resulting in effluents ranging from 20 to 40 mg/l five-day BOD and 25 to 45 mg/l suspended solids is acceptable on the Illinois River. . . .

b. Permissive Treatment and Effluent Requirements Based on Average Strength Municipal Wastes

Type Treatment	BOD or ODI Reduction Percent	Effluent BOD, ODI mg/l	Effluent Suspended Solids mg/l	Stream Dilution Requirements
Secondary	85	30	35	Illinois [River]

The City, acknowledging the "coincidence" (R. 75) that the effluent numbers of the new Rule 404(a) are virtually identical to those of the 1968 regulation, suggests that the earlier regulation was merely a "guideline" in contrast to the present "standard" (R. 32-33). This difference is pure semantics. The City would have us believe that the Sanitary Water Board, in carefully prescribing a figure for effluents to the Illinois River, intended that it could be freely ignored. This incredible interpretation is squarely refuted by the language of the regulation, quoted above: "All. . . facilities. . . shall provide. . . treatment. . . in accordance with effluent guidelines in paragraph 11." No more explicit language for creating a legally enforceable obligation can be imagined. The 1968 regulation imposed effluent BOD and suspended solids requirements of not over 40 and 45 mg/l, respectively, with "average strength" municipal wastes required to meet 30 and 35 and others to be determined by the Agency within the range stated in paragraph 11a.

It is undisputed that the City's facilities never conformed with these limits. They were designed to produce an effluent BOD of 75 mg/l (R. 35); in May 1971 the effluent averaged 80.5 mg/l BOD and 68.5 mg/l suspended solids; in May 1972 the averages were 27 and 88 mg/l respectively (See petition). If the effluent had consistently met the SWB-8 maximum standard of 40 and 45, the City might have a legitimate position;[6] there is no contention that it did. The effluent has been in continuous violation of SWB-8 ever since the adoption of that regualtion in 1968, and based upon the City's own design for the plant the City should have been aware of the violation even if it did not sample the effluent. The resemblance between the old and new standards was no mere coincidence; the new standard was set to indicate what the old had long since required.

6. Even on this assumption the Agency letter of October, 1970, specifically imposing the 30-35 limit (City Ex. 2), gave the City ample time to meet the standard as the Agency had determined it should be applied.

The City's next excuse is that it was lulled into complacency by the fact that the Sanitary Water Board, in listing the steps that must be taken by individual dischargers in order to comply with SWB-8, expressly provided that no additional treatment was required for this facility (SWB-8, p. 15, under the name Oscar Mayer). How the Sanitary Water Board could have believed this to be true is beyond us, since the lagoons were admittedly not designed to allow compliance with the regulation. We do not know on what information that Board acted in purporting to give the City a free pass. To the extent it had adequate information, the SWB as enforcement agency seems to have made a determination squarely contrary to its own regulations. Whether a discharger is entitled to ignore the plain meaning of the law and follow the erroneous advice of the prosecutor seems to us highly doubtful.

Even giving the City the benefit of the doubt, since this bad advice was incorporated into the implementation plan of the regulation, the City has not justified its entire delay. In October 1970 the Environmental Protection Agency informed the City that it was required to provide additional treatment to meet a standard of 30 and 35 mg/l of BOD and suspended solids (City Ex. 2), which in fact was the basic requirement of SWB-8 as well as a slightly tighter version of the present Rule 404(a).[7] This letter made it no longer appropriate, if it ever had been, for the City to rely on the SWB's earlier erroneous interpretation of SWB-8 as not requiring further treatment. The letter required that plans and specifications for meeting the BOD and solids requirements be submitted in January 1971 and that contracts be awarded by July 1971.

The City next relies upon a letter from the Agency in December 1970 (City Ex. 4) that it reads to suggest that the City should after all do nothing until the Pollution Control Board had completed its reexamination

7. The fact that the letter referred in passing to Regulations SWB-14, which applied to intrastate streams not covered by other regulations (See R. 44), as well as to Technical Release 20-22, which set forth the Agency's interpretation of all the SWB regulations, is not decisive. The letter adequately warned the City of its obligations, and in case of a legitimate dispute over the applicable standard the City could have petitioned this Board for relief, which it chose not to do.

of the effluent standards (See R. 16, 47). We cannot so read this rather mysterious document.[8] Even if we could, the argument is that the Agency gave the City a variance from the old regulations until such time as new regulations might be adopted. This is something flatly beyond the Agency's power, for the statute makes it crystal clear that only this Board may grant variances (Environmental Protection Act, § 35). No one in good faith was entitled to rely upon any belief that the Agency could waive the requirements of the regulations. To take the examination of whether existing regulations need strengthening as an excuse to violate the law, as the City did, is a cruel joke indeed to which nothing in the statute or regulations gives the least shred of support.

Thus, at least since October 1970 it has been the City's duty to proceed posthaste with the construction of facilities to meet the 30-35 standard. In fact the City has spent two entire years in simply going through the preliminary stages of studying what to do about the problem. There is no proof that the year and three quarters between notification by the EPA and the July, 1972 compliance date set by the new regulation was too short a time to get the job done or that there is any adequate justification for the need for two additional years. It appears from the record that the City simply made up its mind to go as slowly as possible. We cannot forgive that sort of delay.

The Sanitary District's case is still less appealing. According to a 1971 EPA memorandum (EPA Ex. 8), Beardstown is "the last major city south of Peoria on the Illinois River using primary treatment." The District indicated that the BOD in its effluent ranges from 70 to 120 mg/l (average 90) and suspended solids 40 to 100 (R. 184). Flows during storms, as a result of combined sewers, are as much as 100 times the dry-weather flow (R. 193). At such times raw waste is bypassed directly to the river in large quantities (See EPA Ex. 9 for a graphic description of the bypass problem).

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8. This letter acknowledges that the City must make further engineering studies before submitting final plans and that certain proposed regulations then under Board consideration as to nitrogen and phosphorus would affect plans for plant improvements, promises to notify the City as to any revised treatment dates once the Board had completed its rule-making proceedings, and reaffirms the need for a variance in the event the existing requirements cannot be met. No variance petition was filed until the present one in 1972.

The District makes no claim that SWB-8 did not require it to provide additional treatment, for, in addition to the provisions quoted earlier in this opinion, the regulation specifically lists the Beardstown Sanitary District as requiring construction of secondary treatment and chlorination facilities to begin by January 1969 (SWB-8, p. 9). The record indicates that the District did not bother hiring an engineer to develop a program for secondary treatment until January, 1969 (R. 232), the date when construction was supposed to begin. A revised timetable was sent by the District to the Sanitary Water Board, promising that final plans would be submitted by August 1970 and that the secondary plant would be in operation, presumably with the necessary bypass controls, by September 1971 (EPA Ex. 4). We have no proof that the Board approved this extension,[9] which would have amounted to a variance. The District's consultant admitted he knew no reason for the delay in getting started on time to meet the original deadline (R. 245); the District itself offered only that it had not been aware of the requirements until 1969 (R. 165, 170). It was of course the District's duty to be aware of the requirements.

In fact the District's own revised schedule, whether or not approved, was violated at an early date. The plans the District had promised to file by August 1970 were not even begun until the next November (R. 203). The excuse is that alternative means of stormwater treatment were being studied (R. 219). No extra time for such study had been requested or granted. In late 1970 discussions began with the City as to the possibility of a joint approach through land disposal (R. 174). Although the District professed not to be certain that, with the possibility of joint treatment under discussion, it ought to file the plans for the secondary plant (R. 240), it did so in May 1971 (R. 203), nearly a year late. No extension or waiver of the obligation to file plans had been requested or granted. The plans were rejected as inadequate, for failure to provide dual aeration tanks and backup chlorination equipment (R. 205, 208-09), both needed to protect against pollution in the event of a malfunction. Some corrections in the plans were made although the District continued to object to dual tanks (R. 210), but ultimately the District simply decided not to pursue the secondary plant (R. 214). Land disposal had not been approved, but it was the answer. No extension or relief from the secondary timetable had

9. The attorney for the Agency so suggested in oral argument (R. 150).

been requested or granted, but the District decided not to comply. We find the argument of excuse for what has already approached three years of delay (two on the assumption the revised schedule was approved) in starting construction of secondary and stormwater facilities[10] wholly unconvincing. We cannot forgive such delays.

We therefore cannot grant either the City or the District a shield against liability for the unexcused delays that have postponed correction of their excessive discharges. The further question is whether to deny the variances outright or, as we have done in some cases, to grant a variance upon condition of the payment of a money penalty for past delays, avoiding the necessity for further litigation and giving all concerned a clear indication of the course that should be followed in future. See GAF Corp. v. EPA, #71-11, 1 PCB 481 (April 19, 1971); First National Bank of Springfield v. EPA, #72-301, 5 PCB ___ (October 10, 1972). We think the latter course is precluded here by the absence of any definitive program we can approve as providing an adequate solution to the problem. Until it is clear just what it to be done and when, we think it inadvisable to grant even a conditional variance. The City and the District should get to work at once to comply as quickly as they can with all applicable regulations.

We do not understand why the Environmental Protection Agency has permitted matters to reach this pass without filing a complaint. The Sanitary District has been in continuous violation of its deadlines for years, and nothing has been done. The City was told what it had to do in 1970, and it has done nothing more than prepare a preliminary report. Inattention to such flagrant violations can only encourage violators to commit further delays.

The absence of a complaint in these cases brings to mind once again our observations with respect to municipal sewage treatment problems in adopting the new regulations in March of this year. We noted at the time the statement of Director Blaser of the EPA that most communities had fallen behind the deadlines set by the Sanitary Water Board for additional treatment. In setting new dates for the submission of programs to achieve compliance with the standards, we stressed that the pattern of slippage that had characterized the Sanitary Water Board period "must not be permitted to happen again" and that "substantial money penalties, as well as prohibition of additional connections, are a distinct possibility for communities that do not make diligent efforts to meet the new deadlines." In

10. The Agency's new interpretation of the long-standing stormwater control requirement was made known to the District only in July, 1972 (R. 212). It cannot excuse the failure to comply with the law as previously construed some time before.

the Matter of Effluent Criteria, =R 70-8, 3 PCB 755, 773 (March 7, 1972).

The programs for compliance with many of the new municipal-waste regulations were required to be filed by September 1, 1972, and those for certain other effluent standards by July 1. PCB Regs., Ch. 3, Rule 1002(b). These interim dates are there for the purpose of allowing early enforcement action while there is still some possibility of bringing about timely compliance with the ultimate treatment deadline. Both the July and the September dates have passed, and no complaints have yet been filed for failure to file a compliance program. We urge the Agency to take such steps as may be appropriate to assure that the regulations are obeyed.

The petitions for variance are hereby denied.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion & Order this 14th day of November, 1972, by a vote of 3-0.

Christan L. Moffett