ILLINOIS POLLUTION CONTROL BOARD
March 31, 1971

CITY OF SPRINGFIELD	)	
	)	
	)	
v.	)	PCB#70-55
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion of the Board (by Mr. Currie):

The City of Springfield owns a small and elderly sewage treatment plant, known as the Horse Creek plant, which is equipped with Imhoff tanks and a trickling filter (R.26) and which discharges into a small intrastate stream. Rules and Regulations SWB-14, adopted by the Sanitary Water Board in 1967 and 1968, require additional treatment facilities in such circumstances by July 1972. Plans for such improvements are due in January (tertiary treatment) and July (disinfection) of 1971, and construction is to start six months later.

The City filed a variance petition, asking to be excused from these requirements on the ground that it was in the process of transferring the operation of the plant to the Springfield Sanitary District, a separate governmental body, and that the District's plan was to abandon the plant and divert its influent through a new sewer to the central treatment facility. Attached to the petition was a letter sent by the Environmental Protection Agency to the City in September, 1970, which pointed out the requirements for submission of plans and construction of new facilities and in addition listed numerous violations of housekeeping rules already in force regarding the existing secondary facilities. The petition sought a variance from these requirements as well.

The Sanitary District, which we made a party because according to the City it was to be the entity responsible for the Horse Creek plant in the future, filed an answer agreeing that on February 1, 1971, it had assumed responsibility for the plant and affirming its plan to make improvements to the sewer system, which the hearing later showed meant diversion of the influent and abandonment of the Horse Creek plant by July 1, 1972 (R.62, 76, 152). The Environmental Protection Agency filed a recommendation favoring grant of the variance on condition that the Agency's September demands regarding plant operation be complied with by May 1, 1971; that the City pay a $3,000 penalty for failure to correct these violations before; that interim chlorination facilities be installed; that the sewer improvement permit be applied for by August 1 and the construction contract be awarded by November 1, 1971; that a $75,000 bond be posted; and that sludge be taken to the main plant when Horse Creek is abandoned.

At the hearing the City asked to withdraw its variance petition

on the ground it was no longer responsible for complying with the SWB-14 deadlines (R.4). The Sanitary District refrained from requesting a variance (R.85-86, 95). But Board Procedural Rule 333 requires Board consent for the settlement or other disposition of any pending case. While normally a party requesting a variance is free to withdraw his petition, see EPA v. Granite City Steel Co., #70-34 (March 17, 1971), in this case we think the interests of clarifying a rather murky situation and the avoidance of potential future litigation require us to consider the case on the merits, especially since a full hearing has already been held.

It is clear the variance should be granted, as to the SWB-14 deadlines. Both the City, which retains ownership of the plant (R.144) and is to recover possession after the plant is abandoned in order to dispose of it (R.145), and the District, which is obligated to maintain and operate the plant (R.58) and to construct the new facilities (R.93), are responsible for seeing to it that the regulations are complied with in the future. Both are under a duty to meet the plans and construction deadlines of SWB-14 in the absence of a variance. But the purpose of the timetables is to assure timely construction of tertiary facilities; the purpose of those facilities is to avoid pollutional discharges to the stream, and that end can as readily be attained by diverting the inflow to an adequate plant elsewhere as by constructing tertiary facilities. Indeed, abandonment of inefficient small plants in favor of consolidated facilities is good policy, endorsed by this Board, by the Agency, and by the federal government in its regulations governing construction grants. The submission of plans for a tertiary plant that is never to be built would be a frivolous waste of the taxpayers' money and the engineers' time, and of course we shall exempt the City and the Sanitary District from the filing requirements.

However, in order for the abandonment of the plant to be as good for the environment as the construction of tertiary facilities, a number of conditions must be met. First of all, there must be assurance that the abandonment will in fact be accomplished before the date set in the regulations for tertiary treatment. We agree with the Agency that this requires the filing of detailed plans and the request for a permit by August 1 and the award of contracts by November 1. The Sanitary District agrees that the first date is reasonable (R.97) and questions the second only on the ground that there might be delays in the acquisition of rights of way (R. 152).

Second, diversion of sewage from Horse Creek is an effective means of abating pollution only if the plant to which it is diverted is in compliance with the regulations. It would do no good simply to transfer an inadequately treated discharge from one stream to another. Consequently it is a condition of the variance that the plant to which these wastes are diverted shall comply with the standards of SWB-14 in every respect.

Third, the decision to abandon the plant must not result in a failure to maintain and operate it properly during the interim. There may be less incentive to spend money for maintenance of a plant that is to be given up in a year than of one that is meant to continue in service. Thus in order to protect against this possibility of neglect, which became a fact while the plant was under the City's supervision, we shall condition the variance upon correcting the various violations noted in the Agency's September letter, and by May 1, 1971. The Sanitary District has already corrected several of the violations it inherited (R.66-70) and promises to correct the others by May 1, 1971, (R 77, 79, 80, 88, 91, 149, 151).

The Agency asks us in addition to require a bond to assure these conditions are met. We do not think this is the type of case in which the statute requires a bond, since no one here is asking for more time in which to comply with a regulation. The parties here have proposed an alternative method of achieving the required goal of reducing contaminant discharges, and by the same date as if they had chosen the method prescribed in the regulations. While we agree with the statutory philosophy that a bond provides additional incentives to compliance with a schedule of future compliance, as in the present case, and while we agree we have authority to require bonds as conditions to the grant of variances in cases in which they are not required by statute, we see no reason to distinguish between these parties and others subject to the deferred deadlines of SWB-14, who are not required to post bond. We shall rely on the interim deadlines for plans and contracts to keep watch on progress in this case.

We do not believe the Agency has made a case for requiring the construction of interim chlorination facilities as a further variance condition. It is true that paragraph 14 of Rule 1.08 of SWB-14 authorizes the Board to require interim disinfection before the deadlines specified when this is shown to be "necessary". But the only proof on that issue here consisted of a comparison of bacteria levels in the effluent with the standards that are to be met by mid-1972 (R.102, 112, 126). Such a comparison could be made in practically any case, and if we accepted a showing of bacteria counts greatly in excess of those to be achieved in 1972 as enough to require interim facilities, we would in effect accelerate the date of disinfection for everybody. We do not believe that is what was meant by "necessary". There is evidence to suggest that bacteria are somewhat worse here than at some other plants (R. 126), but the correction of operating problems which we have required by the same date requested for chlorination should, so far as the evidence indicates (R. 125, 131), remove this discrepancy. There was no evidence that the receiving stream is used for recreation or water supply, or that special hazards exist. We shall not require interim disinfection at this time.

The record also does not justify our imposing the last condition requested by the Agency, namely, that on abandonment of the plant the sludge be removed from the Imhoff and final tanks and transported to the main treatment plant. We agree and shall require that the sludge be disposed of in such a way as to avoid any danger of pollution, but on the present record (R. 81-82) we cannot say that hauling it to the main plant is the only solution.

This brings us to the Agency's request that the City be penalized in the amount of $3,000 as a further condition of the variance. The arguing that the Agency is attempting to transform a variance proceeding into an enforcement one without proper notice, as the recommendation was received but two days before the hearing (R. 7, 10, 171). We have previously upheld our authority to require the payment of money penalties as a condition of the grant of a variance in order to promote the policies of the statute, in cases where not to do so would encourage delay. See Marquette Cement Co. v. Environmental Protection Agency, #70-23 (Jan. 6, 1971). In that case we did so on our own motion. When the Agency requests such penalties, there is an additional basis for our power to impose them, for we can construe the recommendation as a complaint. See Norfolk & Western Ry. v. Environmental Protection Agency, #70-41 (March 3, 1971). Our Procedural Rule 309 allows us to consolidate variance and enforcement cases for hearing, see Environmental Protection Agency v. Granite City Steel Co., #70-34 (March 17, 1971), and it is obviously most appropriate, where feasible, to have a single hearing on both variance and enforcement matters involving the same facts.

We said in Norfolk and Western, supra, that the petitioner is entitled to reasonable notice of the Agency's recommendations in advance of the hearing in order that it may prepare its case. This does not mean, however, that the Agency must give twenty-one days' notice, by newspaper advertisement and otherwise, every time it files a recommendation asking money penalties or other variance conditions. Such a requirement would almost invariably delay the hearing until a date beyond the statutory 90-day limit for Board decision in variance cases and thus would effectively destroy the statutory requirement that the Agency actively participate in variance cases. Nor would it serve the purposes for which the statutory notice requirements in enforcement cases were established. In the converse situation, in which a variance petition is filed in response to a complaint, we have held that the statutory requirements of additional public notice and of Agency investigation do not apply, so long as the factual bases of the two claims are sufficiently related, since the statutory purposes have been amply served by the Agency's original notice and investigation. Environmental Protection Agency v. Amigoni, #70-15 (Feb. 17, 1971). The issue, therefore, is not compliance with the procedural requirements for an original complaint, but whether the City was prejudiced by the short time between filing of the recommendation and the hearing.

We think no prejudice occurred and that the issue of penalties is properly before us. The facts on which the Agency seeks the assessment of a penalty are those alleged in the City's attachment to its own petition, namely, the housekeeping requirements listed in the Agency's September letter. Indeed the petition itself asks for a variance from these requirements, and therefore the question of compliance with them was raised by the City itself. The only novel element raised by the recommendation was the purely remedial issue of a penalty for the violations that were plain from the face of the City's own material. On these grounds the hearing officer denied a motion for continuance (R. 11-13) and we concur. The Board's Marquette decision, establishing that penalties may be made a condition of a variance, was issued over a month before the hearing, so the City should have known that the possibility of penalties might be raised by the Board on its own motion. The City in fact put on a case in defense of its actions, arguing both that it had thought the housekeeping corrections were not required until 1972 (R. 51-54) and that it had postponed action because the Sanitary District was soon to take over (R. 39, 41). Moreover, the hearing officer expressly and pointedly allowed an unusual thirty-day period at the close of the hearing for the submission of affidavits or any other material bearing on any issues raised in the case (R. 185-86)[1], and nothing on this issue was received. We think that this action by the hearing officer was quite sufficient to remedy any surprise the City may have experienced upon receipt of the recommendation, and that the City was not prejudiced in its ability to present its case by the short time between filing and hearing. To require a further hearing on the penalty issue, after we have already complied a thoroughly adequate record, would be a waste of time and money.

On the facts the penalty issue is clear. The City ran the Horse Creek plant in a wholly disgraceful way, with utter unconcern for the requirements of the regulations and for the rudiments of respectable operation. In violation of SWB-2, the plant was not under the supervision of a certified operator (R. 39). In violation of SWB-6, no operation reports were submitted to the Agency. In violation of SWB-14, Rule 1.08, paragraph 11c,[2] plant operation was to say the least, not "of such quality to obtain the best possible degree of treatment". Among other things, the primary tanks were overloaded with sludge (R. 67); splash plates on the trickling filter were missing (R. 67); the seal on the center column of the trickling filter was leaking (R. 78); flow measuring equipment was inoperable (R.45); effluent tests were not run (R. 46); seventeen discharge openings on the rotary distributor arms were clogged (R. 111-17). Only the last of these violations had been corrected more than four months after the Agency gave notice of the violations (R. 41, 111).

1. In order to make this extension possible, the parties waived their right to a decision within 90 days after the filing of the petition (R. 187).
2. That the requirements of SWB-14 are now in effect, except where a future compliance date is provided, was established in Springfield Sanitary District v. EPA #70-32 (Jan. 27, 1971).

The City's defenses are unconvincing. No one reading the Agency's letter would have been justified in believing that these violations would be allowed to persist until mid-1972. The letter unmistakably imposes two distinct requirements: "facilities capable of meeting the new effluent quality criteria. . . shall be installed and placed in service no later than July 1, 1972"; and "in order to provide the best treatment possible with the existing sewage treatment facilities and to improve their operation and control, the following recommendations are submitted for your study and action." Moreover, a penalty would be in order even if the Agency had never given prior notification of the violations. The statute does not give polluters a free first bite. To do so would significantly weaken the capability for enforcement, as the Agency cannot be everywhere at once. The regulations are clear, and people must obey them even before the Agency writes them a letter telling them to.

The City's offenses are gross and inexcusable. If the City were a private individual or corporation, we think a penalty in the amount of perhaps $20,000 would be appropriate. Taking money from the public treasury, however, must be a last resort, since it punishes the relatively innocent public and diverts funds from the task of cleaning up the waters, when municipal revenues are too limited to start with. On the other hand, we think it would be folly to lay down a policy of never imposing money penalties on public bodies, for such penalties are needed to deter violations. Moreover, a money penalty or two might have the effect of inducing the public to oversee more closely those who bear the responsibility for sewage treatment, and to replace them when they are remiss in their obligations. All these things considered, we think it appropriate to impose the rather nominal penalty of $1,000 to be paid by the City of Springfield.

Finally, we think it should be pointed out that a more effective and more direct means of deterring such violations in the future, which would have the advantage of punishing those responsible rather than diverting needed public funds, would be for the Agency to seek money penalties against the individuals within municipal government whose gross inattention to duty is responsible for the violations, or to put such individuals in jail. Such penalties are clearly within the contemplation of the statute.

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

ORDER

1. The City of Springfield and the Springfield Sanitary District are hereby granted a variance from the tertiary treatment and disinfection requirements of SWB-14 as applied to the Horse Creek sewage treatment plant, but only on condition that the other provisions of this order are complied with.

2. Plans for the construction of facilities to divert the influent from the Horse Creek plant to an alternative treatment site meeting

the requirements of SWB-14 or other applicable regulations shall be filed, and a permit for such facilities applied for, no later than August 1, 1971; contracts for construction of such facilities shall be let no later than November 1, 1971; and all flows shall be diverted from the Horse Creek plant to a treatment facility meeting all applicable requirements no later than July 1, 1972.

3. The Horse Creek plant shall be brought into full compliance with all applicable regulations, except as noted in paragraph 1 of this order, no later than May 1, 1971. In particular, but not exclusively, the violations noted in the Agency's letter of September 2, 1970 shall be corrected.

4. Immediately upon abandonment of the Horse Creek plant, any sludge remaining in Imhoff tanks or final settling tanks shall be disposed of in a manner that will avoid any danger of pollution.

5. The City of Springfield, no later than May 1, 1971, shall pay to the State of Illinois the sum of $1,000 as a penalty for gross violations of the existing regulations regarding the operation and maintenance of sewage treatment plants.

6. The failure to comply with any provisions of this order, or the denial of a permit for the construction of the diversion facilities described in paragraph 2 of this order, shall terminate the variance granted in paragraph 1.

I, Regina E. Ryan, do hereby certify that the above opinion was approved 31st day of March, 1971.

Regina E. Ryan (JB)

REGINA E. RYAN
CLERK OF THE BOARD

POLLUTION CONTROL BOARD
ORDER

PCB70-55
City of Springfield

I CONCUR

David P. Currie
Chairman

Samuel R. Aldrich
Board Member

Jacob D. Dumelle
Board Member

Richard J. Kissel
Board Member

Samuel Lawton, Jr.
Board Member

I DISSENT

David P. Currie
Chairman

Samuel R. Aldrich
Board Member

Jacob D. Dumelle
Board Member

Richard J. Kissel
Board Member

Samuel Lawton, Jr.
Board Member

DATED: March 31, 1971

STATE OF ILLINOIS

POLLUTION CONTROL BOARD

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April 14, 1971

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PCB70-55
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Dear Sirs:

Enclosed please find certified copies of the City of Springfield Supplemental Comments by Mr. Samuel R. Aldrich which is part of the Opinion adopted by the Board on March 31, 1971.

Kindly acknowledge receipt.

Very truly yours,

Regina E. Ryan
Clerk of the Board

RER:jb
Encl.
CC: Mr. John H. Bickley, Jr.