

ILLINOIS POLLUTION CONTROL BOARD
February 5, 1987

IN THE MATTER OF:)
)
JOINT PETITION OF THE METROPOLITAN) PCB 85-202
SANITARY DISTRICT OF GREATER CHICAGO)
AND THE ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY FOR EXCEPTION)
TO THE COMBINED SEWER OVERFLOW)
REGULATIONS)

MR. PAUL D. LINDAUER, JR. APPEARED ON BEHALF OF THE METROPOLITAN
SANITARY DISTRICT OF GREATER CHICAGO.

MS. H.E. HANSON APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a December 16, 1985, joint petition for exception to the combined sewer overflow regulations filed by the Metropolitan Sanitary District of Greater Chicago (MSD) and the Illinois Environmental Protection Agency (Agency). The MSD and the Agency request an exception pursuant to Subpart D (Sections 306.350 et seq.) from the compliance date established for the treatment of combined sewer overflows (CSOs) by subsections (b) and (c) of Section 306.306(b). They request that such dates be moved out until January 1, 1996. On September 25, 1986, the Board entered an order requesting additional information. The parties responded to that request on November 6, 1986.

The MSD has been designated by the Agency as "the lead agency for facility planning purposes relating to wastewater collection and treatment needs of the residents and municipal governments within its service area." (Pet. at 1). In that capacity, it seeks this relief not only for itself, but also for 29 municipalities within its service area, all of which are expected to achieve compliance by 1996 through completion of the Tunnel and Reservoir Project (TARP). The TARP system "was selected as the best and most cost-effective method of removing CSOs from receiving waterways within the [MSD] District." (Pet. at 2). A grant application for TARP was first made in 1974, and approval was received and construction commenced in 1975. (Pet. at 2). At present 47 of the 110 miles of the TARP system are complete, 3.5 miles are in progress, and 66% of all the CSOs in the service area have been intercepted. (Pet. at 3). 60 more miles are to be constructed to eliminate the remaining 167 CSOs in the 29 municipalities. (Pet. at 3). MSD alleges that it has

"diligently and successfully pursued implementation" of the program and that it intends "to continue implementing TARP, segment by segment, as funding becomes available" on either the state or federal level. (Pet. at 3 and 4). Because of the "complexity and unpredictability of future economic conditions and federal fiscal policy," the MSD has agreed to "reevaluate project status, funding prospects and projected completion schedule in 1990." (Pet. at 4).

The threshold question before the Board is whether the requested relief is necessary. Pursuant to Section 306.306(d), a discharger is not subject to the otherwise applicable compliance dates under the following conditions:

- 1) The discharger's combined sewer overflow is eligible for a construction grant under Section 201(g) of the CWA; and,
- 2) The discharger has filed an application for a construction grant on or before March 1, 1977; and,
- 3) The discharger has timely taken all appropriate pre-grant and post-grant actions necessary to the specific grant step for which the discharger is then eligible, or
- 4) The discharger has been granted an exception by the Board pursuant to Subpart D, an exception procedure is pending, or the Agency has not notified the discharger pursuant to Section 306.352.

With respect to the MSD, each of these conditions has clearly been met, and the Agency has taken the position that the relevant municipalities are in turn protected by the MSD's actions. (Closing Comments at 5). However, the parties point out that a literal reading of 306.306(d)(2) would render that subsection inapplicable to the municipalities in that they did not apply for a construction grant; rather they relied upon the MSD's umbrella application. (Closing Comments at 5).

The Board does not, however, read Section 306.306(d) that literally. Pursuant to Ill. Rev. Stat., 1985, ch. 42, par. 326 the MSD, as unit of local government, has the authority to "provide for the drainage" within its district. Furthermore, pursuant to Section 10 of Article VII of the Illinois constitution, the MSD has the authority to "contract or otherwise associate" with other units of local government." As Mr. Nicholas Melas, President of the MSD, pointed out regarding the TARP project, the MSD has "taken the initiative and assumed the responsibility for the solution to the CSO pollution of the waterways by the extension and completion of TARP. Thus, TARP represents inter-governmental cooperation and action." (R.

14). He went on to testify that the MSD and the Agency have "presented a working program to complete TARP for the 29 municipalities who have joined in this petition. The mayors of these cities have gone on record that, on the local level, the CSO problem cannot be solved." (R. 15). Furthermore, at least 27 of the 29 local units of government affected by this proceeding have filed letters in support of the petition.

While the record is not as clear on the MSD/municipality relationship as could be hoped, the Board concludes that in proceeding toward the completion of TARP, the MSD has acted on behalf of each of the affected municipalities, and as such, the municipalities are not subject to the compliance deadline of Section 306.306. Therefore no relief is needed in that regard. The Board does note, however, that having found such a relationship, the municipalities are linked to the MSD in such a manner that the MSD's failure to continue to take appropriate construction grant action would result in the municipalities loss of the Section 306.306(d) relief. Of course, any failure by a municipality to take necessary action in furtherance of the timely completion of TARP would result in the same loss.

MSD and the Agency state that relief is "also necessary to protect the [Metropolitan Sanitary] District and municipalities from federal enforcement." (Concluding comments at 5). In its January 2, 1984, "National Municipal Policy," USEPA states that the permitting authority must establish enforceable compliance schedules for any POTW that will not be in full compliance by July 1, 1988, and that "this proceeding will serve to establish such a schedule." (Concluding Comments at 6). The MSD and the Agency further state that "in administering the policy throughout Illinois the Agency has required that dischargers address excess flow needs as a component of their individual Municipal Compliance Plans (MCPs). In virtually every case where a CSO exception was an element of the MCP and the proposed implementation schedule extended beyond July 1, 1988, the Agency has required that the schedule be incorporated into the draft order presented for Board consideration." (Response at 5). The MSD and the Agency conclude that "it is prudent for the Board to sanction the schedule proposed" and that "this position is fully consistent with all other CSO petitions in which the Agency has been a joint proponent." (Response at 5).

Pursuant to subsections (g) and (1) of Section 4 of the Illinois Environmental Protection Act, the Agency is the permitting authority in the state and is designated as water pollution agency for purposes of the Clean Water Act. As such, the Agency, not the Board, is responsible for establishing enforceable MCPs for facilities with implementation schedules which extend beyond July 1, 1988. The Board concludes that there is no necessity for it to put its imprimatur on the Agency-imposed MCP.

Having thus concluded that there is no necessity for Board action in this matter, the Board next reaches the question of whether it is "prudent" to take some action. While MSD and the Agency argue that the granting of the requested relief is fully consistent with other CSO petitions, they fail to recognize that this petition is unlike any other CSO petition which has been filed. In all other cases the petitioners are seeking relief from the substantive provisions of Section 306.305 treatment of CSOs. As such, there is no intent to fully comply with the deadlines of Section 306.306, and it is appropriate for the Board to establish some schedule for compliance with the exception order. Here, however, the MSD and the affected municipalities do intend to fully comply with the substantive provisions of Section 306.305 and with the compliance deadlines as allowed pursuant to Section 306.306(d), as discussed above. If the Board were to impose some other deadline for compliance, it would be limiting the rights that the MSD and the affected municipalities enjoy under the existing rules. The Board finds such action to be inappropriate.

For the foregoing reasons, the Board concludes that the requested relief is unnecessary and inappropriate and, therefore, should be denied.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Joint Petition of the Metropolitan Sanitary District and the Illinois Environmental Protection Agency for Exception to Combined Sewer Overflow Regulation filed on December 16, 1985 is hereby denied as unnecessary.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of February, 1987 by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board