

ILLINOIS POLLUTION CONTROL BOARD
January 22, 1987

CITY OF OTTAWA,)
)
 Petitioner,)
)
 v.) PCB 86-165
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter comes before the Board on the October 6, 1986 petition of the City of Ottawa (City) for an eighteen month variance from the January 1, 1986 deadline date of 35 Ill. Adm. Code 306.373. The City seeks variance to enable it to file a petition for exception to the combined sewer overflow (CSO) regulations pursuant to 35 Ill. Adm. Code 306.350 - 306.374 on or before July 1, 1987, and thus to avoid the necessity of seeking equivalent relief via the filing of a petition for site-specific rule change. On November 20, 1986, the Illinois Environmental Protection Agency (Agency) filed a Recommendation that variance be denied for the City's failure to prove that denial of variance would impose an arbitrary or unreasonable hardship. On December 18, 1986, the City filed a response to the Recommendation, which the Board construes as an amended petition by virtue of the supplemental facts contained therein. Hearing was waived and none has been held.

While the City of Ottawa has actively pursued elimination of combined sewer areas over the course of the past ten years, approximately 50% of its service area continues to rely upon combined sewers. The Agency's Recommendation notes that "inspection of the City's sewer system maps indicates that dry weather discharges from several outfalls appear to be a possibility, discharges from separate sanitary sewers are likely, and some obvious bottlenecks are apparent". The City disputes the Agency's statement concerning dry weather overflows, as not borne out by the Infiltration/Inflow analysis of 1977 or the Sewer System Evaluation Survey of 1979. The Agency has made comments concerning nine outfalls. (Rec. p.2, Pet. Response, p.1) CSO is discharged into the Fox and Illinois Rivers. Preliminary studies made by the City concerning its CSO indicate that these discharges have minimal impact on these rivers.

The City has been a participant in the federal construction grant program since "the late sixties". Step 1 work has been completed, and the City has applied for Step II-III funding. However, given the City's funding priority number of 880, and the fact that the effluent discharged from its treatment plant is in compliance with the requirements of its NPDES permit, the City doubts that it will receive federal funding. The City notes that its 1981 Sewer System Evaluation Survey and Facility Plan estimated that the local share for recommended improvements was \$3.5 million, assuming a 75% grant. Assuming no grant funding, the City would need to spend over \$10 million to achieve full compliance with the CSO regulations (Pet. pp. 2-3.)

In support of its request for variance, the City asserts that it was unaware of the January 1, 1986 deadline date for use of the CSO exception procedure mechanism of 35 Ill. Adm. Code Part 306. The City's response to the Agency Recommendation states that "[w]e wish to comply with all of the State and Federal regulations pertaining to CSO's , however, we wish to do so in a calculated timely economical manner as we do have financial constraints and citizens who are concerned with the day to day cost of government" (Response, p. 4).

The City additionally notes that its public water supply system is in need of various improvements. The City has been placed on restricted status because the 6.2 pCi/l combined radium-226 and radium-228 contents of its finished water is in excess of the 5.0 pCi/l limit of 35 Ill. Adm. Code 604.301; the City is currently seeking variance from the effects of restricted status in PCB 86-179. To achieve compliance with this standard will require capital expenditures of between \$1 million and \$4 million, depending upon the compliance option chosen, requiring increases in water and sewer bills of between \$5.00 and \$18.00 per quarter. While the petition is somewhat unclear, it would also appear that an additional \$1,989,000 of improvements to the drinking water treatment plant have been recommended, and that four of these needed projects, which are currently underway, have "depleted the waterworks and sewage operations funds" (Pet. p. 3).

The Agency has no concerns about the environmental effects of grant of variance, correctly noting that the issue of what CSO relief, if any, the City should receive will be adjudicated in a subsequent proceeding. The question is whether the City should be required to seek relief by the filing of a petition for site-specific rule, or whether the City should be allowed to use the procedurally streamlined CSO exception procedure.

The Agency has grave concerns about the precedential effects of granting variance based on the showing made by the City. While the Agency does not dispute the City's assertion that it was unaware of the January 1, 1986, it contends essentially that

"ignorance of the law is no excuse" since every community is obliged to keep informed of governmental regulations. While recommending denial of variance, the Agency has suggested imposition of various conditions in the event the Board should grant the requested variance.

The Board appreciates the Agency's concerns, and agrees that a plea of ignorance, without more, would be insufficient to support a finding of arbitrary or unreasonable hardship. However, considering all of the circumstances here, the Board finds that denial of variance would impose an arbitrary or unreasonable hardship.

As the Agency acknowledges, while the City's consultants were on the Agency mailing list for letters detailing implementation of the CSO program, the City itself was inadvertently omitted from the list. While the Board agrees that the Agency was under no obligation to contact the City individually, it is also the fact that it is rare for Board regulations to embody a cut-off date for use of a procedural mechanism; the Agency's outreach program was instrumental to timely utilization of this procedure by the many communities which have done so. The Board does not find that grant of variance here will serve as precedent, since a) "the Agency does not know of any other community that claims ignorance of the January 1, 1986 deadline" (Rec. p. 5), and b) the circumstances surrounding the adoption of a deadline for utilizing the CSO exception procedure are unusual.

In adopting the CSO exception rules, one of the Board's aims was to assure that consideration of any adjustments in the CSO aspects of sewerage system upgrading be promptly addressed, so as to keep CSO upgrading "on track" with the overall compliance programs. The petitioner benefits from the procedure because it is not only less time consuming, but also less expensive than a site-specific rulemaking; it also enhanced the potential eligibility for any available construction grant funding. The process also allows for the most efficient utilization of scarce resources by the Board and the Agency, as well as the petitioner. The Board also notes that it is in the public interest to grant this variance. A CSO petition, if adequate, can be processed in 3-4 months; a site-specific rulemaking can take 18-24 months. The sooner the key decisions are made on CSO controls needed, in Ottawa, the sooner the solution will come. The environment will thus benefit.

Given that needs of the Board and the Agency for maximization of resources remains the same, the lack of negative environmental impact in using the exception procedures per se, and the City's history of effort to reduce its CSO, the City has made an adequate showing that, given the multi-millions of dollars it will need to finance and expend to achieve compliance

with the CSO and public water supply regulations, it is within the best interests of its citizens to allow use of the more economical procedure for consideration of the City's request for relief from full compliance with the CSO regulations. The Board must again emphasize, however, that in the usual course of events, ignorance of the existence of regulations will be considered by the Board to be, at best, a self-imposed hardship.

The Board notes that the effect of its action is to give the City six months to file a CSO petition. On the basis of this record, it is difficult to determine whether, in choosing the variance term, the City has "built-in" adequate time for the Agency's review of the City's CSO information and determination as to whether the Agency wishes to join with the City as a co-petitioner as provided in Sections 306.351 - 306.352. In the event that such is not the case, the parties are invited to move for reconsideration.

In summary, variance from 35 Ill. Adm. Code 306.373 is granted until July 1, 1987, subject to conditions similar to those suggested by the Agency.

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

ORDER

1. The City of Ottawa is granted variance from 35 Ill. Adm. Code 306.373 until July 1, 1987 to allow it to utilize the combined sewer overflow exception procedure of 35 Ill. Adm. Code 306.350 - 306.374, subject to the following conditions:
 - A) The submittal to the Agency required by Section 306.351 shall be made as expeditiously as is practicable so as to allow adequate time for Agency review and notification pursuant to Section 306.352.
 - B) In the event that the City determines not to file a petition for CSO exception, the City shall notify the Agency in writing of this decision on or before July 1, 1987.
 - C) During the term of this variance, the City shall convey CSO flows to its treatment plant to the maximum extent practicable.
2. Within 45 days of the date of this Order, the Petitioner shall execute and forward to Toby Frevert, Division of Water Pollution Control, Planning Section, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-

five day period shall be held in abeyance for any period this matter is being appealed.

I, (We), _____, having read the Order of the Illinois Pollution Control Board in PCB 86-165, dated January 22, 1987, understand and accept the said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent

Title

Date

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 22nd day of January, 1987, by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board