

ILLINOIS POLLUTION CONTROL BOARD
September 20, 1979

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| ENVIRONMENTAL PROTECTION AGENCY, |) | |
| |) | |
| Complainant, |) | |
| |) | PCB 78-88 and |
| v. |) | PCB 78-225 |
| |) | <u>Consolidated</u> |
| SUNDALE SEWER CORPORATION, an |) | |
| Illinois corporation, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by Mr. Goodman):

Upon careful consideration of the arguments presented herein by the Illinois Environmental Protection Agency (Agency), the Board affirms its Interim Order of July 12, 1979.

In a motion filed August 23, 1979 the Agency requested that the Board reconsider its interim decision which rejected a proposed Stipulation and Proposal for Settlement and remanded the matter to the parties for further proceedings. The Agency asks the Board either to adopt the Stipulation and Proposal for Settlement as presented or, in the alternative, to clarify its Interim Order to allow the Agency to knowledgeably proceed in this and other matters. The July 12, 1979 Interim Order rejected the Stipulation and Proposal for Settlement because it provided for contingent and suspended penalties which the Board has found to interfere with its duty to determine penalty amounts and conditions under which penalties may be warranted.

The Board agrees with the Agency's argument that nothing in the Environmental Protection Act (Act) prevents the Board from imposing the penalty as proposed in the Stipulation. The Board does not, however, agree with the contention that the contingent or suspended penalty serves any useful purpose. In its motion the Agency, in justifying the usefulness of the contingent or suspended penalty, compares the Board's reasoning in determining standard penalties and simultaneously requiring the execution of performance bonds. There is no more usefulness in the imposition of contingent or suspended penalties than there is in the imposition of standard penalties and the simultaneous requirement of executing performance bonds.

Secondly, the Board finds that there is a potential for abuse of the Act when contingent or suspended penalties are imposed. Where a suspended or contingent penalty conditions payment upon noncompliance with the Board's Order, the Board is faced with the tasks of enforcing the penalty and of ensuring future compliance. In these circumstances, noncompliance becomes an appealable issue. In many cases a minimal penalty for an initial violation may have been imposed and collected while a larger, contingent, part of the penalty remained to be delayed, reduced or removed on appeal.

Contingent or suspended penalties also generate the use of the "excessive" penalty. Often the contingent part of a penalty, which is designed to ensure enforcement, is stipulated to even though it can be deemed excessive. The party may believe that it can meet the compliance schedule and therefore agrees to a higher contingent or suspended penalty than it otherwise would have agreed to. However, if the party unexpectedly became unable to comply with the settlement, it would become liable for a penalty which may be beyond its means. In a subsequent court proceeding to force such payment, a judge may well reduce or even eliminate the penalty. Enforcement of the Act is not aided if penalties become uncollectible, and there is likelihood of uncollectibility where the penalty can lie proven to be an excessive one.

The primary objection that the Board has with respect to contingent or suspended penalties is that these penalties interfere with its duty to determine the amounts and conditions of penalties to be imposed for violations of the Act. Although any stipulation or settlement usurps the Board's authority to determine the proper means by which it shall insure compliance with and shall enforce the Act, stipulations containing contingent or suspended penalties interfere with this authority to a greater degree. The Board is not only asked to accept stipulated facts, a compliance program, and a penalty for specific violation, it is asked to endorse an agreed penalty amount for future noncompliance; the Board is usurped from further acting against parties who fail to achieve compliance and the public is estopped from pursuing a complaint regarding that noncompliance.

Stipulations containing contingent penalties preclude the Board from considering aggravating or mitigating factors should noncompliance occur. Neither the parties nor the Board can present legal arguments beyond those included in the Stipulation. Unless the Stipulation contains defenses for noncompliance, the reason for noncompliance is largely immaterial. If the parties fail to foresee and to state all reasonable excuses for noncompliance at the time the Stipulation was drafted, then a party may be required to pay a penalty for noncompliance even when delays of other matters were beyond his control. Even if a provision is included to cover unfore-

seen circumstances, an issue for appeal is created; parties could litigate the question of what is an enforceable circumstance and could further complicate the enforcement process.

The Board in the past has utilized suspended penalties in certain exceptional instances (EPA v. E. Lysle Epperson, et al., 23 PCB 581; EPA v. Timberlane Acres Water Association, 19 PCB 725; EPA v. City of Athens, 24 PCB 687). These cases involved unique circumstances or concerned a penalty mandated by statute which the Board felt would work an arbitrary or unreasonable hardship on the respondent. The significant factor in these cases was that the contingent or suspended penalty was instigated by, and under complete and total control of, the Board itself. The Board fully retained its authority to determine penalty amounts and conditions.

In EPA v. City of Georgetown, PCB 78-127 (April 26, 1979), the Board accepted a settlement agreement with a contingent or suspended penalty. Insofar as the Opinion and Order in Georgetown is in conflict with the Board's Opinion expressed in this Order, it is hereby overruled.

IT IS SO ORDERED.

Mr. Young and Dr. Satchell dissent.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted on the 20th day of September, 1979 by a vote of 3-2.


Christan L. Moffett, Clerk
Illinois Pollution Control Board