ILLINOIS POLLUTION CONTROL BOARD
October 28, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
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v.	)	# 71-25
	)	
CITY OF MARION	)	
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	)	
v.	)	# 71-225
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. William J. Novick, for the City of Marion
Mr. Deneen A. Watson, for the Environmental Protection Agency

Opinion of the Board (by Mr. Currie):

The Agency's complaint (# 71-25) charged Marion with discharging inadequately treated sewage to a tributary of Crab Orchard Creek and with missing January and July 1970 deadlines for submission of plans and award of construction contracts to meet the overflow and advanced-treatment requirements of regulations SWB-14. We rejected a settlement proposal on the ground that it had not been approved by the Agency (# 71-25, May 12, 1971), and a hearing was held June 30, 1971.

The facts are not in dispute. The City operates a trickling filter treatment plant with chlorination, producing a good secondary effluent in dry weather (June 30, pp. 26-27, 31), when the average flow is 500,000 to 800,000 gallons per day (June 30, p. 25). In wet times, however, as much as 11,000,000 to 13,000,000 gallons per day reach the plant (June 30, pp. 24, 158). The hydraulic capacity of the plant is 1,300,000 gallons per day, and flows in excess of that quantity are bypassed directly to the creek without treatment (June 30, pp. 21, 24, 39-40). An Agency witness personally observed the bypass of objectionable materials on December 16, 1970, a date charged in the complaint (June 30, pp. 114-18).

Rules and Regulations SWB-14, adopted by our predecessor the Sanitary Water Board and continued in force by the Environmental Protection Act, require the provision of additional (tertiary or advanced) treatment in Marion's case even as to dry weather flows, because the flow of the receiving stream is too small to assimilate secondary effluent without harm to stream quality. They further require that "control of pollution caused by combined sewer overflow or storm flow bypassing at sewage treatment works be provided at the time of improvement or expansion of sewage treatment works." The date for compliance with both these requirements is July, 1972, with plans to be submitted and contracts awarded substantially in advance in order to assure timely completion.

Plans were due in January 1970 for plants treating more than 10,000 population equivalents, and the City's population is about 12,000 (June 30, p. 55). In any event, the record is clear, and the City admits (June 30, p. 161), that no plans were submitted before August of 1971, which is late regardless of the size of the plant, and that contracts have not yet been awarded, which is also late in any case.

In its proposed settlement agreement, and subsequently, the City promised to submit plans for both bypass control and tertiary treatment by August 1, 1971; to advertise for bids by November 1; and to complete construction by July 1, 1972 (see petition for variance, # 71-225), which would mean that the admitted delay in getting started would not delay the operation of the required facilities. The City's program at that stage consisted of the addition of two aerated lagoons to capture, retain, give 50% treatment to, and chlorinate bypasses up to ten times normal dry weather flow, with one of the lagoons to serve in normal times as a tertiary facility (June 30, pp. 162-67).

A few days before the proposed August 1 date for plan submission the City received word (Oct. 16, p. 16) of the Agency's just revised Technical Policy 20-24, which among other things states that when waste stabilization ponds such as those proposed are used "provision must be made to remove algae and other suspended solids to meet the intended treatment requirements and effluent criteria" (Section XII C). The theory apparently underlying this provision was suggested by an Agency witness (June 30, pp. 184-85):

> Presently we are requiring permits for lagoon type systems for tertiary treatment. It's been kicked around out in the field that lagoons sometimes don't provide the treatment necessary in that respect. Sometimes they tend to grow algae, which would increase possibly the suspended solids coming out of it . . . .

The growth of algae in the lagoon, in other words, might result in a biochemical oxygen demand and suspended solids in excess of the applicable limits of 4 and 5 ppm respectively.

Confronted with the new technical policy, the City filed its original plans according to its proposed schedule (Oct. 16, p. 18), set to work immediately on new plans to meet the provisions of the Technical Policy (Oct. 16, pp. 21-23), and filed for a variance that would extend the dates for plans, bids, and compliance by eight weeks (Oct. 16, pp. 23-24) because of the algae provision. We held an additional hearing October 16 on the variance petition (# 71-225).

The City's revised plans were submitted September 30 (Oct. 16, p. 23), within the proposed eight-week extension. The tertiary lagoon will be replaced by sand filters that should do the job with dry-weather flow without creating any algae problem (Oct. 16, pp. 16, 26). Flows in excess of plant capacity will be retained in a single aerated lagoon and chlorinated before any discharge to the stream (Oct. 16, p. 16). Although the treatment plant together with the bypass retention system will be able to handle a flow at the rate of no more than 8,640,000 gallons per day (Oct. 16, p. 43) (which is roughly ten to fifteen times dry weather flow), the City will also replace a half mile of leaky interceptor sewer that is responsible for a "great amount" of infiltration (Oct. 16, p. 44). The City therefore predicts that "when we finish this project and eliminate some of our sources of pollution [infiltration], we will be able to give either complete treatment or primary treatment to all of the flow that comes to the plant in wet weather" (Oct. 16, p. 45). Finally, the City has agreed that "after the peak flows pass, we have provisions for draining the contents of the storm water pond back to the plant during periods of low flow and giving it complete treatment" (Oct. 16, p. 46). The completion date proposed for this improved system is September 30, 1972, with bids to be sought by December 30, 1971 (Oct. 16, p. 24).

The improvements in the revised program are considerable and commendable; the City has substantially upgraded its provisions with regard both to tertiary treatment and to stormwater. The tertiary standards will be more certainly met; infiltration reductions will greatly reduce, if not eliminate, the proportion of flow receiving no treatment; some retained stormwater will be run through the plant for full treatment. We think the two months' delay to prepare this revised program well worth the time, and certainly we will not penalize the City for those two months. While the Agency is quite right in its suggestion (Oct. 16, pp. 30-37) that the regulation itself made relevant the question whether algae would make lagoons inadequate to meet the effluent standard, the record shows that up until the issuance of the revised Technical Policy in July 1971 the Agency had been willing to grant permits for lagoons in similar circumstances (June 30, p. 185; Oct. 16, p. 34). The law was not changed, but the Agency's understanding for applying it was, and no penalties are in order for those who in good faith did what the Agency said was sufficient.

At the same time, we cannot find fault with the Agency for publishing its revised policy statement. Whenever new policies are promulgated, someone's plans may be affected; desirable changes cannot be deterred by that fact. Time allowances have to be made in such cases, as here, to avoid hardship. But, if the Agency is right in its new algae position, the change has succeeded in arresting at the drawing-board stage the construction of an inadequate facility. We can only view that accomplishment as a plus.

The City also tells us that, with a reasonably dry Spring, it may be able to complete the retention lagoon by July of 1972 despite the change of plans (Oct. 16, pp. 40-41). We shall require that it do its best to do so, in light of the importance of eliminating the existing raw sewage discharges.

We need not today decide whether the Agency is right that lagoons are insufficient to meet the standards without algae removal, since the City has committed itself to a more certain solution. This question, together with that of the degree of treatment that will ultimately be required of excess flows, is being thoroughly explored in the pending rule-making proceeding #R71-14. Nor need we decide whether the requirement that bypass flows be given primary treatment and chlorination means just what it says, or whether, as the City says it was orally informed by the Agency, no more than ten times the normal flow must receive even this much treatment. That figure appears neither in the regulations, which govern, nor in the Technical Release. Since we are here considering only primary treatment, any flows not captured will go raw to the stream; even a high degree of dilution (June 30, p. 176) can hardly avoid a nuisance when the ingredients of raw sewage are considered. It is therefore gratifying that the City has committed itself to a program of reducing infiltration as well as providing retention capacity so as to enable it to give at least primary treatment and chlorination to all flows reaching the plant, and we shall require it to adhere to that program.

Although SWB-14 states that bypass flows "shall be given primary treatment, and chlorination if necessary," it also requires "the control of pollution" resulting from bypasses, and at the time of required treatment plant improvements. The Agency interprets this (Technical Policy 20-24, Section VII-A) to require more than primary treatment when primary treatment is inadequate to prevent pollution. Because of the enormously heavy organic load in the "first flush" from a storm (see June 30, p. 32), that portion, the Agency says, should receive full plant treatment; whether primary treatment for the remainder suffices is to be determined on a case-by-case basis according to such factors as the flow of the receiving stream in order to avoid violations of the water quality standards.

We agree that primary treatment of bypasses cannot in all cases be a complete answer under the regulations. In many cases it is feasible and reasonable to retain a large percentage of the excess flow to be run through the plant later on for complete treatment (see, e.g., League of Women Voters v. North Shore Sanitary District, # 70-7, March 31, 1971). Whether in Marion's case more is required than is now proposed cannot be determined from the present record. The Agency will make an initial determination of adequacy in passing on the permit application now pending before it. Even if greater retention capacity is ultimately required, the present plan seems a most likely intermediate step that should eliminate a large part of the present nuisance, and its construction

ought not to be delayed.

In sum, from the vantage point of today, we find the City's program an appealing one in terms both of time and of ultimate performance, with reservations only as to whether additional retention capacity may later prove necessary. We therefore approve the City's program schedule on the conditions spelled out in the order.

This leaves for consideration the question of money penalties for missing the deadline for submission of plans. There is no satisfactory explanation for this failure: The City knew of SWB-14's requirements in 1968 or 1969 (June 30, p. 161), and the Agency's alleged change in policy respecting the size of the retention basin (June p. 158) and the acceptability of tertiary lagoons came after the plan deadline had already been missed. The importance of the interim dates for submitting plans and letting contracts is well illustrated by this case. Had plans been submitted when required, the adequacy of the proposed bypass facilities could have been fully examined, and any inadequacy corrected, without jeopardizing compliance with the ultimate operation deadline of July 1972. As it is, discounting the eight-week postponement that is not the City's fault, if the lagoon is too small there will very likely be a further delay before it can be enlarged.

Thus the seriousness of the City's failure to file timely plans should not be underrated. On the other hand, Marion's position is more fortunate than that of some, for, apart from the Agency's revised effluent lagoon policy and the question of lagoon size, Marion was able to promise that it would suffer no delay in meeting the most important deadline, that for compliance with the effluent and treatment requirements. To do so it has shown a high degree of commitment and energy, especially in its prompt and constructive response to the Agency's revised policy, that cannot go unnoticed.

The question of a penalty in this case, moreover, is a part of a most disturbing larger picture. Marion is far from alone in missing its plan deadline, nor is it among the worst offenders. Without condoning past lapses, we think it appropriate to encourage those who have fallen behind to make every effort to make up for it. We shall therefore look with some indulgence upon local governments that file programs in the immediate future that will result in compliance within a short time after the ultimate deadline. For those whose violations will substantially prolong pollution and who even now fail to come forward with as expeditious a program as is practicable, the penalties may be quite severe. Cf. GAF Corp. v. EPA, # 71-11 (April 19, 1971); EPA v. Incinerator, Inc., # 71-69 (Sept. 30, 1971); Lloyd Fry Roofing Co. v. EPA, # 71-4 (Oct. 14, 1971). We do not exclude the possibility in such cases of penalties cumulating each day ultimate compliance is postponed.

In light of these policy considerations we penalize Marion the nominal sum of $100. It was not until after the date for submitting plans had passed that the City took serious steps to live up to the obligations of SWB-14 (June 30, p. 156), and we cannot let the serious violation of the important interim deadline pass altogether. But Marion's exemplary response to the filing of the complaint, its excellent record for operation of its existing plant, and the critical fact that its error is not expected to result in continued pollution greatly mitigate the offense. We sincerely trust that others in similar circumstances will follow Marion's example immediately without waiting to be prosecuted. Any substantial delay in cleaning up our waters resulting from the failure of municipal officials to obey the law would be a tragedy not only for the environment but for public confidence in government as well.

The City in the final hearing raised the question of financing (Oct. 16, p. 57). The Agency described the chances of state aid as very good, and the City hopes for federal assistance as well. As we have said before (see City of Mattoon v. EPA, # 70-8 (Feb. 17, 1971); Sanitary District of Durand v. EPA, # 71-317 (October 18, 1971)), outside help is all very well, but the obligation is that of the local government, and the unavailability or postponement of outside money cannot be an excuse for pollution. We view the City's program as a commitment to build the necessary facilities, with no ifs, ands, or buts. If it were not such a commitment, we could not approve it. Our order today requires the City to construct those facilities in order to abate pollution violations. To comply with such an order the City is authorized by Section 46 of the Environmental Protection Act to issue general obligation or revenue bonds, if necessary, without referendum and, we have held, witnout regard to any existing merely statutory limit otherwise applicable to bonded indebtedness. League of Women Voters v. North Shore Sanitary District, # 70-7 (March 31, 1971). No specific order to issue bonds is necessary; we leave the question of how to raise money to the City, but the money must be raised. See Ruth v. Aurora Sanitary District, 17 Ill. 2d 11, 158 N.E. 2d 601 (1959). We shall require, as agreed, the submission of a plan for financing the necessary improvements (Oct. 16, p. 74).

A few procedural matters require brief mention. The City challenged the Board's jurisdiction on the ground that no Board member was present at the hearing (June 30, pp. 48-51). The motion is denied. The Rule referred to (Board Procedural Rule 204), applies only to rule-making proceedings of general applicability, not to individual adjudications. To require the attendance of a Board member at each of the hundreds of hearings held each year would be a physical impossibility, and both the statute and the rules are plain that individual cases, apart from rule-making, may be handled by hearing officers who are not Board members. The decision is made by the Board alone on the basis of the record. We also deny the motion (June 30, pp. 51-53) that the Board view the premises. Viewing is an extraordinary procedure that is

authorized but not required by Procedural Rule 322. To view in every case would impose an intolerable burden. We see nothing in the present case to suggest that a viewing would contribute materially to the resolution of any of the issues. The motion to dismiss on the ground that Board decisions are to be reviewed in the Appellate Court (June 30, p. 191) is also denied; the suggestion is premature, since any invalidity in the appeal process would not affect the Board's authority, and erroneous, since the governing provision is the Environmental Protection Act, which incorporates only certain portions of the Administrative Review Act. Direct Appellate Court review is flatly authorized by the Illinois Constitution. Finally, we see no merit in the attacks on the admissibility of certain samples (June 30, pp. 90, 193), but in any case those samples were not necessary to the violations found and played no part in our decision.

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

ORDER

1. The petition of the City of Marion for a variance extending the date for compliance with the treatment and effluent standards of SWB-14 until September 30, 1972, is hereby granted, on condition that the following provisions of this order are met.

2. The City of Marion shall abate its discharge of untreated or inadequately treated sewage and its violations of the Environmental Protection Act and of regulations thereunder with regard to tertiary treatment and stormwater bypassing in accordance with its revised program as submitted September 30, 1971, and with the following schedule:

   a) Advertisement for bids: December 30, 1971;

   b) Completion and operation of facilities: September 30, 1972.

3. The City of Marion shall make every reasonable effort to complete the facilities for stormwater bypasses by July 31, 1972.

4. The City of Marion shall replace the interceptor sewer described at p. 44 of the October 16 transcript in accordance with its program as submitted September 30, 1971, and shall actively pursue a program to discover and eliminate other sources of infiltration subject to reasonable abatement.

5. If the above measures prove inadequate to eliminate raw sewage bypasses by September 30, 1972, the City of Marion shall present to the Agency and to the Board within thirty days thereafter a program for additional pumping and retention capacity.

6. If the bypass control measures in the above program do not provide adequate treatment to satisfy the Agency, the City of Marion shall seek Board review of the Agency's determination or shall submit a revised program, in either case within the time allowed by statute for appeal from a permit denial. In either case, unless the present bypass program is wholly incompatible with that required to meet the Agency's objections, the Agency shall issue a permit conditioned on additional measures to be taken in the future, and work shall proceed on the present program as a first phase of compliance in accordance with the present schedule.

7. The City of Marion shall within 35 days after receipt of this order post with the Agency a bond or other security in the amount of $100,000 to assure compliance with the terms and conditions of this order.

8. The City of Marion shall within 35 days after receipt of this order pay to the State of Illinois the sum of $100 as a penalty for its failure to meet the requirements of SWB-14 with respect to the submission of plans and the award of construction contracts.

9. Within 60 days after receipt of this order, the City of Marion shall submit to the Agency and to the Board a plan assuring financing of the program herein approved, together with a study by bond counsel discussing the various financing alternatives available.

10. Further proceedings in this matter will be held if circumstances so require, and jurisdiction is retained for that purpose.

I, Regina E. Ryan, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 28 day of October, 1971.

Regina E. Ryan