

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Blackstone Valley District Commission
RIPDES Permit No. R.I. 0100072

DECISION AND ORDER

This matter is before the Hearing Officer on the appeal of the above numbered RIPDES permit (hereinafter "Permit") filed by Save the Bay with the Department of Environmental Management's Water Resources Division on February 4, 1991.

The appeal was heard on July 17, 1991 pursuant to a bench order issued by Federal District Court Judge Francis Boyle requiring inter alia, that an adjudicatory administrative hearing be held and completed by July 18, 1991.

S. Paul Ryan, Esq. represented Save the Bay, Gary S. Powers, Esq. represented the Department of Environmental Management, Division of Water Resources (hereinafter "Division"), and James Purcell, Esq. and John Boehnert, Esq. of Partridge, Snow & Hahn represented the Blackstone Valley District Commission (hereinafter "BVDC").

A Status Conference was held on Wednesday July 10, 1991 at which time the parties advised the Hearing Officer of the status of this matter and identified intended witnesses. A Notice of Adjudicatory Hearing was issued on July 12, 1991 and mailed to all individuals required to receive notice pursuant to the Rhode Island Pollutant Discharge Elimination System (RIPDES) Regulations issued by the Division. The Notice is part of the Administrative hearing file.

A Prehearing Conference was held at 9:30 a.m. on July 17, 1991

immediately prior to the hearing. The parties agreed that the issues to be decided by the Hearing Officer were as follows:

1. By January 1, 1992 the permittee shall submit a combined sewer overflow (hereinafter "CSO") abatement report to the Division of Water Resources.
2. By January 1, 1993 the permittee shall have completed the second phase of the project, namely, the design of the facilities or structures recommended in the final CSO study.
3. By January 1, 1995 the permittee shall have completed construction of CSO abatement projects.

During the course of testimony Save the Bay withdrew issue one (1) leaving only issues two (2) and three (3) for consideration.

The parties stipulated to the following qualification of experts:

Robert Standley was qualified as an expert in civil engineering and water quality. Mr. Standley was further qualified over counsel's objections as an expert in NPDES permitting.

Raymond Marshall, Executive Vice President of BETA Engineering, Inc. was qualified as an expert in engineering and design issues concerning combined sewer overflow facilities and water and wastewater facilities planning, design and construction management.

Edward Szymanski qualified as a expert in consideration of combined sewer overflow abatement issues in the planning, design and approval of waste water facilities.

The following documents were admitted as full exhibits:

Save the Bay (STB) 1 - Resume of David Standley.

STB 2 - National Combined Sewer Overflow Strategy of EPA.

STB 3 - EPA Region I Statement on Combined Sewer Overflows and Water Quality Standards.

Blackstone Valley District Commission

- STB 4 - Combined Sewer Overflow Policy of the Department of Environmental Management.
- STB 5 - Combined Sewer Overflow Permit Writers Guide Manual of the Environmental Protection Agency 3/19/91.
- STB 6 - Blackstone Valley District Commission RIPDES Permit dated 12/31/90 (with compliance order attached).
- STB 7 - BVDC Agreement for Consulting Services for Combined Sewer Overflow Pawtucket/Central Falls with Beta Engineering.
- STB 8 - Current Newport Permit # R.I. 0100293 regarding combined sewer overflows and relating to compliance, permit modification and consent decree.
- DEM A - Administrative Record (comments, Applications, Draft Permits and Public Hearing Transcript).
- DEM B - Resume of Edward Szymanski.
- BVDC 1 - Resume of Raymond Marshall.

Mr. Standley testified on behalf of Save the Bay concerning the establishment of dates for sub-elements of the CSO study. During the course of this testimony the parties indicated that they had stipulated in federal court that BVDC will submit the study by May 1, 1992. As a result, Save the Bay withdrew issue one from consideration.

With regard to the second phase of the project ("design phase") Mr. Standley testified that he believes it is possible to set deadlines now in terms of elapsed time after approval of the facilities plan. He indicated specific sub-parts into which the design phase could be broken and accompanying time frames but indicated that the phases depend on the particular project and owner as well as the scope of the project. He indicated a general total time frame of twelve (12) months for the design

phase. Under cross-examination Mr. Standley candidly conceded that he lacked specific knowledge of the Department of Environmental Management review process, and state purchasing, contracting and bidding procedures. Mr. Standley also agreed that one purpose of the study is to obtain site specific data to reduce over or under building, a second purpose is to save money and a third purpose is to determine capacity. He further conceded that the design would be significantly impacted by the CSO study. In spite of the foregoing, Mr. Standley remained firm in his opinion that time frames for the design phase should presently exist.

With regard to the issue of a date for construction completion, Mr. Standley indicated generally that sound engineering practice would require acceptance of the facilities plan prior to the establishment of construction deadlines.

Raymond Marshall was the only witness offered by BVDC. Mr. Marshall has over eighteen years experience in the wastewater engineering field. Presently he serves as Vice President of Beta Engineering, Inc. and supervises all Beta projects. Approximately fifty percent (50%) of his time is consumed by combined sewer overflow projects. Mr. Marshall has been involved with this particular CSO problem to varying degrees since 1988. He has worked with the Division of Water Resources since that time on behalf of the cities of Central Falls and Pawtucket, and more recently on behalf of BVDC. Mr. Marshall testified in detail regarding the purposes of the study and the extent and types of sampling, monitoring and analysis being performed for the study. He explained the broad scope of the project as well as the

financial implications and potential overflow containment processes. In Mr. Marshall's opinion it is absolutely necessary that the study be completed prior to the establishment of deadlines for phase two (design phase).

The reasons given for the delay in establishing design deadlines were that the differences in technology, size, location and number of facilities can be such that premature setting of design timelines would be inappropriate from an engineering standpoint.

Upon cross-examination Mr. Marshall declined to render an opinion as to a reasonable time frame to complete the design phase. He indicated that in his opinion it is impossible to determine how long the design phase would take absent a completed facilities plan.

Mr. Marshall testified that it would be possible to establish a phasing schedule within a couple of months after acceptance of a facilities plan.

Edward Szymanski, Department of Environmental Management's Associate Director for Water testified on behalf of the Division of Water Resources. He generally described the manner in which the subject permit was issued. Mr. Szymanski testified that the BVDC application followed normal permitting procedures and that EPA has concurred that the permit is appropriate as drafted. He further stated that current BVDC RIPDES permit is consistent with the EPA approved DEM CSO policy and standards. Mr. Szymanski opined that it is not sound engineering practice to impose or change dates when at the present time neither DEM nor BVDC are aware of what will be constructed. Under questioning from the Hearing Officer, Mr. Szymanski indicated that once the facilities permit plan is submitted then the Division of Water Resources

will review the schedule and approve, reject or modify it and incorporate the schedule into the permit requirements with appropriate opportunity for public comment and appeal.

This appeal challenges only the portion of the permit which relates to the compliance schedule for the CSO study, design of the facilities and construction of the structures and facilities. Testimony of all the witnesses indicates that the design phase and construction phase should be accomplished incrementally. Testimony differs only on the issue of when it is possible to set the deadlines for each phase. In weighing the testimony of the witnesses I have accorded the testimony of Messrs. Marshall and Szymanski more weight than that of Mr. Standley.

Although I believe Mr. Standley to be credible, I believe the experience of both Messrs. Marshall and Szymanski as well as their knowledge concerning scope and extent of the CSO problems at issue and their particular knowledge of the BVDC and its predecessors impels me to give their testimony more weight.

Based on all the testimony and documents of record I believe it is clear that it is premature to require specific deadlines in the permit for either the design phase or the construction phase until such time as a facilities plan is approved by the Division of Water Resources. Testimony from all witnesses indicated that it is not possible to set deadlines for the construction phase at this juncture. Testimony on that issue characterized such an endeavor as speculative and not sound engineering practice.

While I agree with appellant that the design and construction phases

should be accomplished in segments, I disagree that the timelines for phasing of the design or construction portions of the compliance order can presently be set.

The Division has indicated through the testimony of Mr. Szymanski that specific deadlines for phasing will be imposed after approval of the facilities plan. The proposed deadlines will follow the usual course of public notice and hearing prior to becoming final and Save the Bay and other interested parties will have an opportunity to comment on those timeframes.

FINDINGS OF FACT

After careful review of all the documentary and testimonial evidence of record I find as fact the following:

1. Upon expiration of their existing permit BVDC applied to the Division of Water Resources for issuance of a RIPDES Permit.
2. The BVDC RIPDES permit application went to public notice and hearing. A public comment hearing was held on November 7, 1990 by the Division of Water Resources.
3. The draft permit was forwarded to EPA and EPA concurred with the draft permit.
4. On December 31, 1990, the Division of Water Resources issued a RIPDES Permit to the Blackstone Valley District Commission, Permit No. RI 0100072.
5. On February 4, 1991 Save the Bay filed a written appeal with the Division of Water Resources.

6. On July 5, 1991 a status conference Order was mailed to counsel for BVDC, the Division of Water Resources, Save the Bay, City of Pawtucket, City of Central Falls and the Attorney General's Office.
7. A status conference was held on July 10, 1991.
8. Notice of Prehearing and Hearing was mailed to all persons requiring notice under Rule 52 of the RIPDES Regulations.
9. A Prehearing Conference and Adjudicatory Hearing was held and concluded on July 17, 1991 at the offices of the Administrative Adjudication Division for Environmental Matters, One Capitol Hill, Providence, Rhode Island.
10. Attachment D of the Permit requires BVDC to submit a CSO report to the Division for comment and thirty days thereafter a final report to include, inter alia, alternatives for eliminating or mitigating environmental impact, recommendations and an implementation schedule to achieve the recommendations. The Permit provides that the implementation schedule may be a phased program. The Permit requires that upon submission of the final study to DEM, the permittee shall begin the implementation of the second phase of the project.
11. The "second phase" of the project includes the design of the facilities and structures recommended in the study in accordance with a schedule to be included in the final study.
12. Beta Engineering, Inc. is presently conducting a CSO study for BVDC which will be submitted to DEM by May 1, 1992.
13. The CSO study is a \$1.7 million project aimed at obtaining the best

technology to deal with combined sewer overflows at the least cost.

14. Design of the facilities and structures will be significantly impacted by the CSO study.

15. In order to design effective facilities one must know when and under what circumstances overflows occur, slope and flow volumes.

16. Ongoing monitoring and sample analysis including the monitoring of five (5) storm events will yield information necessary to determine what is happening in the sewer system during storm events and the predicted impact on receiving waters.

17. More than one process exists to deal with overflows. One process is more costly than the other.

18. Differences in size, technology, location and number of storage facilities will directly affect the duration of the design phase.

19. Until the physical and technological extent of the project is determined, it is not possible to set deadlines for compliance for the design phase.

20. The CSO study will yield the size, location, number of storage facilities, technology and cost appropriate for the permit.

21. The extent and design of the structures depends on the number and nature of the facilities and that will not be known until the facilities plan is approved by DEM.

22. Completion of the CSO study is necessary precondition to a design plan.

23. Once the facilities permit plan is submitted to the Division, the

Division will approve, reject or modify the schedule and it will be incorporated into the permit requirements.

24. Prior to approving final dates for compliance, the Division will provide for public comment hearing.

25. The design phase should be accomplished in phases but the phases cannot be determined prior to completion of the facilities plan.

26. There exist a series of steps that are identifiable upon completion of the facilities plan which could, at that time, be incorporated into the permit with appropriate deadlines.

27. The Newport RIPDES Permit #RI0100293 contains a specific compliance schedule.

28. The compliance schedule for the Newport permit was drafted only after completion of a facilities plan.

29. After completion of the facilities plan the Division of Water Resources will issue a detailed compliance schedule as was done for the Newport Permit.

30. The establishment of dates for the construction phase is speculative at this juncture.

31. Sound engineering practice would require the facilities plan to be considered prior to setting construction deadlines.

32. It is not appropriate to issue compliance requirements that exceed the life of the permit.

33. The Department of Environmental Management CSO policy as contained in STB 4 was approved by EPA.

34. The BVDC permit is consistent with the standards in DEM's CSO policy.

CONCLUSIONS OF LAW

Based on all the documentary and testimonial evidence of Record I conclude the following as a matter of law:

1. The permit compliance schedule as contained in Attachment D of the Permit is reasonable and appropriate.
2. The portion of the permit dealing with combined sewer overflows is consistent with the Department's Combined Sewer Overflow Policy.
3. The challenged portion of the permit is not in contravention of the RIPDES Regulations or Chapter 46-12 of the Rhode Island General Laws.

Therefore, it is

ORDERED

That the appeal of Save the Bay is DENIED.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final Order.

August 14, 1991
Date

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

The within Decision and Order is hereby adopted as a final agency Decision and Order.

August 20, 1991
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded, regular mail, postage prepaid to John Boehnert, Esq., Partridge, Snow & Hahn, 180 South Main Street, Providence, Rhode Island 02903; S. Paul Ryan, Esq., 670 Willett Avenue, East Providence, Rhode Island 02915; Terrence Tierney, Special Assistant Attorney General, 72 Pine Street, Providence, Rhode Island 02903; George M. Muksian, Esq., City Solicitor, City of Central Fall, 580 Broad Street, Central Falls, Rhode Island 02863; Fred E. Joslyn, City Solicitor, City of Pawtucket, 137 Roosevelt Avenue, Pawtucket, Rhode Island 02860; Juan Mariscal, Narragansett Bay Commission, 44 Washington Street, Providence, Rhode Island 02903; and via inter-office mail to Gary E. Powers, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908; and Edward Szymanski, Chief, Division of Water Resources, 291 Promenade Street, Providence, Rhode Island 02908 on this 20th day of August, 1991.

Jacqueline Ballard