

WATER POLLUTION:

The Missouri Water Pollution Board does not have the authority to require as a condition of a permit for the construction and operation of a water treatment facility which will at present meet the requirements of Chapter 204, RSMo, the Missouri Water Pollution Law, the posting of financial security to ensure future treatment facilities when such additional facilities will be required.

OPINION NO. 239

May 13, 1971



Mr. Jack K. Smith
Executive Secretary
Missouri Water Pollution Board
P. O. Box 154
Jefferson City, Missouri 65101

Dear Mr. Smith:

This is in reply to your request for an official opinion of this office as to whether the Missouri Water Pollution Board may require as a condition of a permit for the construction and operation of an interim water pollution treatment facility the escrow of funds, posting of bond, or the giving of other bona fide financial security, sufficient to provide for the ultimate construction of full treatment facilities.

Chapter 204, RSMo 1969, establishes the board and provides for powers and duties to carry out the purposes of the law. Section 204.020 states the policy of the law, Section 204.080 specifies certain duties, and Section 204.090 specifies certain powers.

Subsection 1 of Section 204.030 declares it unlawful for any person to cause water pollution. Subsection 2 and 3 provide for a permit as follows:

"2. No person, without first securing from the board a permit, shall construct, install or modify any system for disposal of sewage, industrial wastes, or other wastes or any extension or addition thereto when the disposal of the

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sewage, industrial wastes or other wastes constitutes pollution as defined in this chapter; increase the volume or strength of any sewage, industrial wastes or other wastes in excess of permissive discharges specified under any existing permit; or construct or use any new outlet for the discharge of any sewage, industrial wastes or other wastes into the waters of the state which constitutes pollution as defined in this chapter.

"3. Any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in the discharge of sewage, industrial wastes or other wastes into the waters of the state shall apply to the board for a permit to make a discharge which constitutes pollution as defined in this chapter. The board, under the conditions it prescribes, may require the submission of such plans, specifications and other information as it deems relevant in connection with the issuance of the permits. The board shall determine whether or not the discharge will cause a condition of pollution contrary to the public interest. The board may issue a permit which authorizes the person to make the discharge, and may specify on the permit the conditions under which the discharge shall be made. The board may revoke or modify any permit if the holder of the permit is found to be in violation of subsection 2, or if the holder of the permit fails to operate an existing facility as specified in the approved plan. No permit may be revoked or modified without first giving thirty days' written notice to the holder of the permit of intent to revoke or modify the permit."

Nowhere in the provisions cited above, nor in any other provision of Chapter 204, is there a specific requirement for the posting of financial security.

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Administrative agencies are creatures of statutes and do not have any jurisdiction or authority except such as has been conferred by law. Soars v. Soars-Lovelace, Inc., 346 Mo. 710, 142 S.W.2d 866 (1940). The powers of administrative agencies can only be exercised as are conferred expressly or by necessary implication. Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43, 27 A.L.R. 1061 (1922). Such implied powers must be reasonably incidental to the purposes of the express powers. State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (1943).

Since Chapter 204 does not expressly confer such power, the question is whether there is an implied power. If there is any doubt or ambiguity concerning the existence of a power, it should be resolved against the agency. Wright v. Board of Education, supra.

The power in question is whether the board can require the posting of security as a condition for the issuance of a permit. Section 204.030(3) relating to permits does provide for conditions on permits but does not specify what kinds or types of conditions.

In the facts you have presented the applicant for the permit will meet the requirements of the law by building the so-called interim facility. However, it is anticipated that as the applicant increases its activities additional or different treatment facilities will be required. The financial security would therefore be used as assurance that at some future date the applicant will meet the requirements of the law.

It is our opinion that under such circumstances the Water Pollution Board does not have such implied power to impose as a condition on the permit the posting of financial security. The purpose of the Water Pollution Law is to require a permit for the construction and operation of sewage disposal facilities only when there is pollution. Section 204.030. Since at the present time the facility to be constructed under the present permit application apparently is adequate to meet the requirements of the law, the only condition that could possibly be required by the Board would be those relating to the present facility.

Imposing as a condition the posting of financial responsibility on the present license for some possible future problem is no different than any agency requiring the posting of financial security for a license based on the possibility that at a future date the law may be broken. Such a requirement without specific statutory authority is beyond the power of the Board.

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CONCLUSION

It is the opinion of this office that the Missouri Water Pollution Board does not have the authority to require as a condition of a permit for the construction and operation of a water treatment facility which will at present meet the requirements of Chapter 204, RSMo, the Missouri Water Pollution Law, the posting of financial security to ensure future treatment facilities when such additional facilities will be required.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General