OFFICIAL OPINION NO. 7

June 12, 1975

Mr. Oral H. Hert
Technical Secretary
Indiana Stream Pollution Control Board
1330 West Michigan Street
Indianapolis, Indiana 46204

Dear Mr. Hert:

This is in response to your request for my Official Opinion on the following question:

> "Do all publicly-owned sanitary districts in the State of Indiana have sufficient legal authority to implement user charges and require industrial cost recovery in compliance with Section 204(b) of the Federal Water Pollution Control Act Amendments of 1972 in order to be eligible for federal grant funding of publicly owned sewage treatment works?"

ANALYSIS

I

In 1972, the United States Congress enacted P.L. 92-500, the "Federal Water Pollution Control Act Amendments of 1972", which amended P.L. 84-600 known as the "Federal Water Pollution Control Act". Pursuant to § 201(g)(1) of P.L. 92-500, the Administrator of the United States Environmental Protection Agency is authorized to make grants to any qualified state, municipality, or intermunicipal or interstate agency for the construction of publicly owned sewage treatment works.

Section 204(b)(1) of P.L. 92-500 requires that the applicant show that he will institute a user charge system whereby each recipient of treatment services will pay his proportionate share of the costs of operation and maintenance, including replacement, of the resulting sewage treatment plant. Secondly, the applicant must require the industrial

users of the works to pay that portion of the cost of construction of the works attributable to the Federal share of the cost of construction.

II

Under Indiana law, sanitary districts may be organized by four methods. First, any city or town may organize a sanitary district under Indiana Code of 1971, Section 19-2-5-1—19-2-5-30, hereinafter referred to as the new Sanitary District Act. Second, districts may organize under Indiana Code of 1971, Sections 19-2-27 *et seq.*, 19-2-28 *et seq.*, 19-2-28.5 *et seq.*, and 19-2-14 *et seq.*, hereinafter referred to as the old Sanitary District Act. Third, any area in the state may organize into a regional sewage district pursuant to Indiana Code of 1971, Section 19-3-1.1, the Regional Sewage District Act. Fourth, landowners may organize a special sewage district pursuant to Indiana Code of 1971, Sections 19-3-2-1 and 19-3-2-3(5), the Conservancy District Act.

First, cities may organize under the new Sanitary District Act. P.L. 210 of Acts 1975 has special importance as it amended sections 19 and 20 of the new Sanitary District Act. Indiana Code of 1971, Section 19-2-5-19, as amended, now reads:

> "Any city or town may bill and collect rates or charges for the services to be rendered after the contract for construction of the sewage works has been let and actual work commenced in an amount sufficient to meet the interest on the revenue bonds and other expenses payable prior to the completion of the works.
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> "The works shall be deemed to benefit every lot, parcel of real estate or building connected or to be connected with the sewer system of the city or town as a result of construction work under the contract unless found and directed otherwise by the common council or board of town trustees, and the rates or charges shall be billed and collected accordingly.
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> "The rates or charges may be fixed on any one (1) or any combination of the following bases as the com-

mon council or board of town trustees determines is necessary in order to establish just and equitable rates or charges:

(1) a flat charge for each sewer connection;
(2) the amount of water used on the premises;
(3) the number and size of water outlets on the premises;
(4) the amount, strength, or character of sewage discharged into the sewers;
(5) size of sewer connections; . . ."

Indiana Code of 1971, Section 19-2-5-20, as amended, reads as follows:

"Just and equitable rates and charges shall be such rates and charges as produce sufficient revenue to pay all the legal and other necessary expense incident to the operation of the works to include maintenance costs, operating charges, upkeep, repairs, interest charges on bonds or other obligations, . . . Revenues collected pursuant to this section shall be deemed revenues of the works. However, in any industrial cost recovery received by the city or town and required to be paid by industrial users pursuant to the terms of a federal grant shall not be deemed to be revenues under this chapter and the common council or board of town trustees shall have authority to use industrial cost recovery funds as provided by the terms of federal grants. . . ."

The Act contained an emergency clause and took immediate effect upon signature of the Governor on May 5, 1975. These amendments provide clear and unmistakable authority for a sanitary district to institute a user charge and industrial cost recovery system.

Second, cities, except for first class cities organized under Indiana Code of 1971, Section 19-2-14, *et seq.*, organized under the old Sanitary District Act, will be considered together.

The following three enumerated sections of the old Sanitary District Act relate to each other and answer your question as it pertains to second class cities:

1. Indiana Code of 1971, Section 19-2-27-3 provides:

   "Any city or town creating a sanitary district pursuant to this chapter [19-2-27-1—19-2-27-3] shall specifically have all of the authority, duties and responsibilities authorized or imposed for certain cities of the second class pursuant to IC 1971, 19-2-28, sections 1 and 2 [19-2-28-1, 19-2-28-2]."

2. Indiana Code of 1971, Section 19-2-28-1(c) made applicable to second class cities by the above section empowers certain other second class cities to also create a sanitary district for, among other things, to:

   ". . . continue to utilize a system of charges for sewage facilities to provide revenue for constructing and operating sewage works, as defined in chapter 61, Acts of 1932, special session [repealed], and the acts amendatory thereof and supplemental thereto, and improvements, additions, and extensions and the issuance and retirement of revenue bonds for the construction of such sewage works improvements, additions and extensions thereof, including the collection of delinquent charges."

Chapter 61 of Acts of 1932 (Spec. Sess.), referred to above was repealed and replaced by the new Sanitary District Act as compiled at Indiana Code of 1971, Sections 19-2-5-1 through 19-2-5-30.

3. Indiana Code of 1971, Section 19-2-28.5-3 provides:

   "Except as provided by this chapter [19-2-28.5-1—19-2-28.5-4], the establishment and operation of any such sanitary district created by such city of the second class and all of the powers and duties of the board of sanitary commissioners of such sanitary district including the issuance of bonds payable from special benefit taxes on the property in the sanitary district

> shall be governed by all the provisions of chapter 28 [19-2-28-1—19-2-28-7] of this article; Provided, however, That no bonds of the sanitary district shall be sold without the prior approval of the common council of the city, and Provided further, That the common council shall approve all budgets and tax levies of the district."

By virtue of the above three enumerated sections of the old Sanitary District Act, the rate setting provisions of Indiana Code of 1971, Sections 19-2-5-1—19-2-5-30, hereinafter referred to as the new Sanitary District Act, apply to districts organized under the old Sanitary District Act.

The second enumerated section quoted above from the old Sanitary District Act is pivotal. It applies to those cities organized under the first enumerated section; it also applies to those cities organized under the third enumerated section of the old Sanitary District Act. The second enumerated section incorporates Chapter 61 of Acts of 1932 (Spec. Sess.) which has been repealed and replaced by the new Sanitary District Act. As shown above, the new Sanitary District Act contains clear and unmistakable provision of authority for a sanitary district to institute a user charge and industrial cost recovery system in compliance with section 204(b) of P.L. 92-500. As a result, for purposes of section 204(b), sanitary districts organized under the old Sanitary District Act, except for first class cities, have all the powers included in sections 19 and 20 of the new Sanitary District Act.

Having dealt with the three enumerated sections of the old Sanitary District Act relating to second class cities, the remaining section relevant to first class cities now may be examined. Pursuant to Indiana Code of 1971, Section 19-2-14-5 first class cities can charge rates based on the amount, strength, or character of the sewage discharged into the sewers. These rates, pursuant to Indiana Code of 1971, Section 19-2-14-4 shall be sufficient together with the taxes levied pursuant to this Act to produce revenues to pay for operation, maintenance, administrative expenses, and the principal

and interest on the bonds for the revolving funds. Pursuant to Indiana Code of 1971, Section 19-2-14-23 the revenues from the special *ad valorem* tax shall be used in addition to the rates to pay for operation, maintenance and repair of the sewage disposal plant. The overlapping provisions, of the special *ad valorem* taxes and rates, in providing for the cost of operation and maintenance including replacement should be treated differently to the extent that P.L. 92-500 requires that only the user charge can provide revenue for the cost of operation and maintenance including replacement of the plant. However, the wording of Indiana Code of 1971, Section 19-2-14-23 is not restrictive. Therefore, the first class cities have the authority to agree to provide that only the revenue derived from the user charge rates would be applied to the cost of operation and maintenance, including replacement, of the plant pursuant to Indiana Code of 1971, Section 5-19-1-1 which reads as follows:

> "The state, or any political subdivision thereof, are [sic.] each hereby authorized and empowered to the full extent authorized by the Constitution of Indiana and not prohibited by law, to accept the provisions of any law of the Congress of the United States of America, or any rule, regulation, order or finding made pursuant thereto, now or hereafter in force, which, upon acceptance, authorizes the state, or any political subdivision thereof, to cooperate with the federal government, or to receive benefits for itself or any of its citizens; and the state, or any political subdivision thereof is hereby authorized and empowered to do any and all acts, and to make any rule, regulation, order or finding, that may be necessary to cooperate with the federal government or to effectuate the purposes of any such federal law."

The authority for first class cities to impose an industrial cost recovery provision is provided by Burns' Administrative Rules and Regulations (35-5237)-21(E) which requires, as a condition for issuing a permit to discharge pollutants, the permittee must show he will require industrial users to com-

ply with the requirements of § 204(b) of P.L. 92-500. For these reasons, first class cities organized under Indiana Code of 1971, Section 19-2-14 *et seq.*, also have authority to comply with the provisions of P.L. 92-500.

Third, as relating to Regional Sewage Districts, Indiana Code of 1971, Section 19-3-1.1-20 provides:

> "The rates and charges for a waterworks may be fixed on a flat charge for each connection, the amount of water consumed, the size of the meter or connection, whether the property served has been, or will be, required to pay separately for the cost of any of the facilities of the works, or any combination of these or other factors as the board of trustees shall determine is necessary to establish just and equitable rates and charges.
>
> The rates and charges for services of either a water or sewer system need not be uniform throughout the district or for all users. The board of trustees shall have authority to exercise reasonable discretion in adopting different schedules of rates and charges, or making classifications in schedules of rates and charges, based upon variations in the costs of furnishing the services (including capital expenditures required) to various classes of users or to various locations within the district, where there are variations in the number of users within various locations within the district. The rates or charges for a sewage works may be fixed on the basis of a flat charge for each connection, the amount of water on the premises, the number and size of water outlets on the premises, the amount, strength or character of sewage discharged into the sewers, size of sewer constructions, whether the property served has been, or will be, required to pay separately for the cost of any of the facilities of the works, or any combination of these or other factors as the board of trustees determine is necessary in order to establish just and equitable rates or charges."

The language excerpted from the Act above makes clear and unmistakable provision of authority for a regional sewage district to comply with section 204(b) of P.L. 92-500.

Fourth, as relating to Conservancy Districts, Indiana Code of 1971, Section 19-3-2-48.5, provides:

> "(a) Whenever the board of directors issues revenue bonds for the collection, treatment and disposal of sewage and liquid waste, they may:
>
> (1) establish just and equitable rates and charges and use the same basis for such rates as provided in IC 1971, 19-2-5-19 and 19-2-5-20;
> (2) collect and enforce such rates beginning with the commencement of construction as provided in IC 1971, 19-2-5-19; . . ."

Inasmuch as the language excerpted above incorporates the new Sanitary District Act treated above, it makes clear and unmistakable provision of authority for a Conservancy District to comply with Section 204(b) of P.L. 92-500.

CONCLUSION

It is, therefore, my Official Opinion that all publicly-owned sanitary districts in the State of Indiana, organized pursuant to law, possess the authority to implement user charges and industrial cost recovery systems for federal grant funding of publicly-owned sewage treatment works in compliance with Section 204(b) of the Federal Water Pollution Control Act Amendments of 1972.