

ILLINOIS POLLUTION CONTROL BOARD

April 25, 1974

ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 73-21  
 )  
 CITY OF HERRIN and FEDDERS-NORGE )  
 DISTRIBUTORS OF CHICAGO, INC., )  
 )  
 Respondents. )

Delbert D. Haschemeyer, Assistant Attorney General for the Agency  
James B. Bleyer, Attorney for Respondent City of Herrin  
Charles J. O'Connor and John E. Costello, Attorneys for Respondent  
Fedders-Norge Distributors

OPINION AND ORDER OF THE BOARD (by Mr. Henss)

The Environmental Protection Agency filed a two count Complaint against Respondents City of Herrin and Fedders-Norge alleging that Respondents had violated the Environmental Protection Act and the Regulations for Refuse Disposal Sites and Facilities at a land-fill owned by the City of Herrin. Herrin was charged with: a) depositing oils, various neutralizing compounds and other contaminants upon the land on at least 18 separate dates since July 26, 1971 so as to cause a water pollution hazard in violation of Section 12(d) of the Environmental Protection Act; b) causing or allowing open dumping of garbage on at least 8 separate dates since January 13, 1972 in violation of Section 21(a) of the Act; c) causing or allowing the open dumping of refuse on at least 11 separate dates since September 23, 1971 in violation of Section 21(b) of the Act and Rule 3.04 of the Rules and Regulations for Refuse Disposal Sites and Facilities; d) on 11 dates the failure to confine dumping to the smallest practical area in violation of Rule 5.03 of the Rules, failure to prevent blowing litter in violation of Rule 5.04 of the Rules, failure to spread and compact refuse as rapidly as it was admitted to the site in violation of Rule 5.06 of the Rules and failure to provide proper daily cover in violation of Rule 5.07(a) of the Rules; e) open burning on three specific dates since December 7, 1971 in violation of Section 9(c) of the Act and Rule 3.05 of the Rules; f) allowing the deposition of liquid and hazardous substances without written

approval from the Agency on 18 specific dates since July 26, 1971 in violation of Rule 5.08 of the Rules; and g) failure to provide adequate final cover since January 3, 1972 in violation of Rule 5.07(b) of the Rules.

The Complaint charged Respondent Fedders-Norge with depositing oils, various neutralizing compounds and other contaminants at the Herrin landfill site in a place and manner so as to create a water pollution hazard in violation of Section 12(d) of the Act. Fedders-Norge was also alleged to have deposited these materials without written approval from the Agency in violation of Rule 5.08 of the Rules. The Fedders-Norge violation allegedly occurred on 18 specific dates since July 26, 1971.

Respondents filed Motions for Dismissal contending that the Complaint was not specific or that the Agency had failed to abide by the Board's Procedural Rules. We denied those Motions and ordered that the case proceed to hearing.

In the Fedders-Norge Motion to Dismiss it was argued that the Complaint failed to set forth the nature and extent of the contaminants alleged to have been discharged and failed to identify the body of water alleged to have been subject to a water pollution hazard. Such lack of specificity was alleged to have precluded Fedders-Norge from preparing an adequate answer or defense. In our Order, which denies the Motion, we told Respondents that additional information required for the preparation of the defense could be obtained through prehearing procedures pursuant to our Procedural Rules. On March 1, 1973 Fedders-Norge took the Discovery Deposition of the Agency's inspectors. During the testimony of inspector Calvin Badding the following dialogue occurred:

"Q. (by Mr. O'Connor" Now, you said it's a hazard to water only. Now, will you tell us what water is being hazarded, threatened.

A. (by Mr. Badding) Well, it would be whatever water your drainage system ends up in.

Q. And what water is that?

A. In this case I cannot tell you.

Q. So, you say --

A. Water pollution was there.

Q. So, you say there's a hazard to water, but you don't know what the water is you're talking about, is that correct?

A. Not the tributary, no.

Q. How far is the Big Muddy from this site?

A. I don't know.

Q. Do you have an approximate idea?

A. No, sir.

Q. Is there a creek called Pond Creek in the area?

A. I'm not familiar with it.

Q. The Big Muddy wasn't threatened, is that correct?

A. I have no way of knowing.

Q. The Pond Creek wasn't threatened, is that correct?

A. Here again I have no way of knowing.

Q. Was there any sub-surface water that was being threatened?

A. Sub-surface water I have no way of knowing.

Q. You didn't take any tests to find out if sub-surface water was being threatened, did you?

A. No

Q. Did you take any soil borings at any time?

A. No sir.

(Fedders-Norge Exhibit B(1, 2 and 3))

Q. (by Mr. Bleyer) If I understand you correctly, you have no tests -- you have no results of any tests made regarding water outside this area shown in Exhibit 1, is that right?

A. That is right.

Q. So you can't say whether there's been any effect on the quality of the water outside of this area, is that right?

A. Not at this time.

Q. And you have no knowledge as to whether any of the water in the bodies of water which are set forth in the Exhibit 1 could have supported aquatic life or fish prior to any dates mentioned here today, is that right.

A. Well, I cannot say that I've ever seen these ponds previous to the time I went back there.

Q. So, you would have no knowledge whether they would support aquatic life, is that right -- your own knowledge?

A. No.

Q. And have you had any tests for quality of this water shown in Exhibit 1? I don't know what you've got that marked as. This lake. (Indicating)

A. No, I don't.

Q. So, would it be fair to state that you have no evidence, personal knowledge or evidence of any effect that this landfill has had on any area outside the landfill itself?

A. That's right."

(Fedders-Norge Exhibit C(1 and 2))

From the above dialogue, we must conclude that Respondents' attempt to ascertain the identity of the threatened water through prehearing discovery was not successful. This deprived Respondents of information paramount to their defense. Respondents were entitled to know prior to trial which waters were supposedly being threatened. Accordingly, Paragraph 2 of Count I and Paragraph 3 of Count II are dismissed.

Agency Exhibit #14, a memo from Agency Inspector Rodger A. Walker to the Division of Water Pollution Control, was introduced into evidence at the public hearing. This memo provides in some detail, observations made by Walker while investigating the Herrin landfill site, and indicates that the "threatened" water was ground water rather than surface water. At page 2 of this memo Walker stated: "...It is my feeling that an enormous potential for the contamination and/or pollution of the ground water supplies exist in the area of the Herrin landfill. The

entrance of the liquid waste into ground water supplies, through the sinkholes located downstream from the present liquid waste dumpsite, creates this problem." Walker concluded his report stating "Again, I must say that, according to my personal observations in the area, the potential for ground water pollution definitely exists in the Herrin landfill. The potential is most severe because the liquid waste is being dumped on rather 'porous' soil".

The Walker report was apparently not revealed during pre-hearing discovery. In any event, a report by Bauer Engineering Inc. (Fedders-Norge Group Exhibit #1) would have been sufficient to rebut any inference relative to ground water contamination arising from the Walker report. Bauer Engineering reported that an impervious shale formation 200 feet thick underlying the dump area should preclude the possibility of ground water pollution.

In lieu of protracted public hearings, the parties have submitted stipulations of fact. However, the parties ask us to draw different conclusions from those facts and they have submitted differing Proposed Orders for our consideration.

Agency exhibits submitted via Stipulation substantiate the charge that Fedders-Norge has deposited liquid materials at the Herrin landfill. The dumping of waste by Fedders-Norge occurs in an area distant from the active landfill operations. A truck fitted with a large tank and clearly marked "Norge Division, Herrin, Illinois" is seen at the landfill in numerous Agency photographs. These photographs show a white liquid being discharged from the truck. Vegetation in the path of flow of the liquid appears to be dead or oil covered.

Agency memoranda and investigation reports indicate that the liquid waste flows from the discharge area in the direction of a drainage ditch. The liquid temporarily pools in a swampy area before flowing toward several sink holes. A sink hole nearest the discharge point was ordered filled by the Illinois Department of Mines and Minerals in November 1971. In the Walker report, it was noted that other sink holes were found "downstream" from the filled sink hole. Further "downstream" is a pond which was formed when an old strip mine pit filled with water. Walker noted in his report that the pond appeared to be covered with an oil film but Walker could not conclusively state that the oil had come from the Fedders-Norge discharge site.

The photographic evidence portrays a deplorable situation at and near the discharge site. We are not moved by Fedders-Norge contention that these wastes "may be used to enrich the

soil in the landfill until such time as the landfill is completely filled. As Fedders-Norge points out, the Board recognized in proposed (now adopted) Solid Waste Regulations that liquid waste could be accepted at a sanitary landfill. However, Fedders-Norge has grossly misinterpreted our intent if it believes that this Board would approve of the manner in which the liquid wastes are dumped at the Herrin landfill.

In its Answer, Fedders-Norge attempted to show, in a variety of imaginative ways, that former Rule 5.08 of the Rules did not apply to its discharge operation. That Rule provided:

"Sewage solids or liquids, septic tank pumpings, and other liquids or hazardous substances shall not be discharged to a sanitary landfill until written approval has been obtained from the Department. Special provisions may vary from site to site depending upon local conditions, and will be specified in the approval letter."

The first of these defenses argued that Rule 5.08 was an unconstitutional delegation of authority in that the term "hazardous waste" is neither defined in the Rules nor in the Environmental Protection Act and that no standards or conditions relative to the issuance of the permit are set forth in said Rules. This argument is without merit.

More than six years prior to the adoption of the Rules, the Legislature passed the Uniform Hazardous Substance Labelling Act. Within this Act (Chapter 111 1/2, Section 252-4) is found the definition of hazardous substance:

"Hazardous substance means any substance or mixture of substances which is toxic, corrosive, an irritant, strong sensitizer, flammable or which generates pressure through decomposition, heat or other means and which may cause substantial personal injury or illness during any customary or reasonably anticipated handling or use including reasonably foreseeable ingestion by children and also means any radioactive substance, if, with respect to such substance as used in a particular class of article or as packaged, the Director determines by regulation that the substance is sufficiently hazardous to require labelling in accordance with the Act in order to protect the public health."

Rule 5.08 allows for the discharge of liquid or hazardous substances only after written approval and provides for special

provisions to allow for different local conditions. It is unreasonable to expect that one set of standards could be devised and set forth in a Rule to cover every possible situation that could occur at every landfill site in the State of Illinois. The standard seems sufficient to us.

Fedders-Norge next argued that Rule 5.08 was contrary to law in that it requires the Department of Public Health to issue permits whereas the Environmental Protection Act calls for such permits to be issued only by the Environmental Protection Agency. Since the enactment of the Environmental Protection Act such permits are issued only by the EPA, and Respondent should not have been confused by the former law.

The Company contends that the Rules (including 5.08) are not operative because they have not been properly filed with the Secretary of State. In support of this argument, Fedders-Norge states that upon repeal of Section 475 of Chapter III 1/2 of the Illinois Revised Statutes, the Rules and Regulations were not filed or refiled "as required by law". No specific "law" is cited but it is clear that the law referred to is "Rules and Regulations of State Agencies", Chapter 127, Sections 263-268.1 of the Illinois Revised Statutes.

The Rules and Regulations for Refuse Disposal Sites and Facilities were adopted on March 22, 1966 and properly filed with the Index Division of the Secretary of State of Illinois. Any person whose actions were subject to those Rules and the Statute (Refuse Disposal Sites and Facilities, Chapter III 1/2, Sections 471-476) could have ascertained his liability by a reading of the Rules and the Statute. Neither Rule 5.08 or any other part of the Rules specifically dealt with or referred to Section 475. The applicability of Section 475 could only be discovered by reading the Statute. Because of this, the repeal of Section 475 did not create any need for amendment of the Rules. There were absolutely no changes required in the wording of Rule 5.08 or any other part of the Rules. Therefore, there was no justification for a refileing of the Rules with the Secretary of State and they remained in full effect and were continued pursuant to Section 49 of the Environmental Protection Act.

For its next defense, Fedders-Norge argued that its discharge was not hazardous in nature. The current Regulation now defines hazardous waste as "solid waste with inherent properties which make such waste difficult or dangerous to manage by normal means including but not limited to chemicals, explosives, pathological waste, radioactive materials and waste likely to cause fires."

The phrase "but not limited to" was intentionally included in the definition of hazardous waste to allow flexibility for the myriad of possibilities that can be encountered when dealing with chemicals. To be classified as hazardous, under this definition, it is not required to show the actual death or injury of an individual who has encountered the substance.

A number of samples were taken by the Agency to identify the chemical composition of the liquid discharge. Analysis reveals at least 19 different chemical elements or compounds in the liquid. Included in varying concentrations were magnesium, sodium, potassium, ammonia, and barium. These substances could be reactive under some circumstances or could be considered irritants or poisons in certain concentrations. However, the record does not establish the hazardous nature of these substances in the concentrations found in the Fedders-Norge discharge. The discharge might in fact be hazardous but the record is not sufficient to make that finding. This failure of proof in this particular case does not preclude the Agency from determining upon better information that the discharge is in fact hazardous.

In any event the discharge is liquid, and Rule 5.08 was applicable for that reason. Agency Exhibit #10, 13 and 22 show a liquid being discharged from a tank mounted on a truck bearing the words "Norge Division, Herrin, Illinois" on its doors. Fedders-Norge in its Answer admitted depositing liquid at the site. Rule 5.08 is clearly applicable.

Fedders-Norge further states that the former Rule 5.08 applied only to the operator of the landfill and not to Fedders-Norge. If the Rule is construed to apply to a person doing the dumping, Fedders-Norge denounces the Rule as unconstitutional in that "a person not in the business of operating a 'sanitary landfill' or 'dump' would be unaware of the Regulations and as a consequence would not be bound thereby".

The language of Rule 5.08 was not vague or ambiguous. The phrase "shall not be discharged" is clear and precise in its intent. It absolutely prohibited the discharge of liquids and hazardous materials by anyone without specific written approval. Fedders-Norge is bound to comply with all Illinois Statutes and Regulations and it is the Company's obligation, as a matter of routine business practice, to become acquainted with the laws applicable to it. Ignorance of the law is not a license to pollute.

Another argument advanced by Fedders-Norge is that the Herrin site is a dump not a landfill. This exercise in semantics is based upon an Application for Registration of Refuse Disposal Sites filed in 1968 in which the City of Herrin indicated by a checkmark that the facility was a dump. The Board recognizes

that the words dump and sanitary landfill have been used interchangeably in the past. However, as people became aware of the actual distinction between a dump and a sanitary landfill, the interchangeable misuse became less common. In 1963 the Legislature outlawed dumps and open dumping in Illinois (Chapter 111 1/2, Section 461). The operation of the Herrin site as a dump would be illegal even prior to the enactment of the Environmental Protection Act.

As their final "additional affirmative defense" Fedders-Norge argues that:

1. The Board is without power to impose a monetary fine or penalty, and
2. The Board's power to issue a cease and desist order is an unconstitutional delegation of legislative authority and an attempt by the Legislature to confer injunction powers on an administrative Agency in violation of the constitutional precept of separation of powers.

We have consistently denied these contentions when raised in other cases. The Illinois Supreme Court has recently decided that our exercise of the penalty power is valid and not an unlawful delegation of power. *City of Waukegan v. Pollution Control Board* \_\_\_ Ill. \_\_\_ ( Mar. 1974)

We deny all motions for dismissal and affirmative defenses raised by Respondents except those defenses they raise to the Section 12(d) charge, and the argument Respondents raise regarding the hazardous nature of the liquid discharge.

Fedders-Norge has apparently succeeded in reducing the volume of oil waste being discharged at the landfill site from 10,000 gallons per day to about 2500 gallons per day under its Waste Oil Management System Implementation Plan. This reduction was achieved through the institution of better housekeeping practices and by reclaiming and recycling some of the waste oil it previously sent to the landfill.

There are presently two waste streams being discharged to the Herrin landfill by Fedders-Norge. One is waste cutting oil from the plant's machine shop and the other is the oil contaminated overflow from the tub and basket fabrication area.

The waste cutting oil is the runoff from the borings pit in the machine shop. It is composed of a water soluble oil and a non-water soluble oil. About 500 gallons per day of this oil waste are collected and discharged at the landfill site.

The waste from the tub and basket fabrication area is comprised of a mixture of water and water soluble drawing oil. It comes from the overflow of the tub and basket expansion process and from spray washing of the tubs and baskets after expansion. Occasional malfunctions in the expansion equipment result in spills of hydraulic oil which become part of this waste stream. About 2,000 gallons per day of this oil-water mixture are discharged at the landfill.

As part of the Management Plan, waste cutting oil will be reclaimed and reused in the plant's machine shop. A significant amount of "non-water soluble" cutting oil is already being recycled within the plant. Borings contained in this oil will be segregated and centrifuged and the oil thus collected will be sterilized, stored in drums and reused when needed.

The laboratory bench tests have shown that it may be possible to treat the waste oil from the tub and basket fabrication area with alum or ferric chloride in conjunction with pH adjustment as a method of reclaiming the oil. Under the proposed plan, laboratory observation and in-plant evaluations will be conducted to determine if the water soluble drawing oil can be reused after reclamation. Waste hydraulic oil found in this waste stream will be separated from the emulsified oil waste and combined with the other waste hydraulic oils originating in the plant for disposal. Fedders-Norge plans to dispose of this waste oil in one of two ways: it can either be stored and shipped semi-annually to an oil reclamation facility or it can be stored and taken semi-annually to a landfill for disposal. We would strongly encourage Fedders-Norge to make all possible efforts to have the oil sent to an oil reclamation facility.

If it is found necessary to take this oil to the landfill, the Management Plan calls for proper land disposal techniques to be followed to insure that there will be no pollution problems associated with this disposal. This is to be accomplished by applying the oil in one-fourth or one-half inch applications. The application of waste oil on a given section of the site may be repeated on a yearly basis. Spoil material is to be provided for admixture and covering during the winter operation.

Sludge produced as a by-product of the treatment processes will probably be no more than 700 gallons per day before sludge dewatering and a maximum of 210 gallons per day after sludge dewatering. This sludge will be disposed on a daily or weekly basis at the Herrin landfill. Proper land disposal techniques will be followed to insure that no pollution problem will be associated with the disposal.

The implementation schedule accompanying the Waste Management Plan shows that it will take slightly in excess of 36 weeks before completion and start-up of all equipment specified in the Waste Management Plan. It would have been helpful to have had Agency comment on this Proposed Implementation Schedule. In the absence of such guidance from the Agency we are inclined to approve this schedule as submitted.

Agency exhibits submitted as evidence in the Stipulation convincingly proved that the violations occurred as alleged in Count I of the Complaint. EPA inspection sheets and photographs reveal that debris and refuse have been deposited at the landfill site at multiple locations with little or no effort made to cover the material. Photographs taken on different dates show clearly identifiable material present on both dates thus proving that the City of Herrin has not provided proper daily cover for the refuse (Agency Exhibits 16, 19 and 22). Some refuse is clearly identifiable in photographs taken three months apart (See Agency Exhibits 23 and 25). Smoke and flames from the open burning of refuse is clearly depicted in other Agency photographs (Agency Exhibits 19, 22, 23, and 30).

Both the Agency and the City of Herrin agreed to the imposition of a \$1,000 fine in the event we find that the violations did occur.

We dismiss the allegations that Respondents caused a water pollution hazard in violation of Section 12(d) of the Act. We find Respondents guilty of all other violations and will require that they cease and desist from their violations and pay appropriate monetary penalties.

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

ORDER

It is the Order of the Pollution Control Board that:

1. City of Herrin shall pay to the State of Illinois by June 1, 1974 the sum of \$500 as a penalty for the violations found in this proceeding. Penalty payment by certified check or money order payable to the State of Illinois, shall be made to: Fiscal Services Division, Illinois EPA, 2200 Churchill Road, Springfield, Illinois 62706.

2. City of Herrin shall immediately cease and desist from open burning of refuse at its landfill site.
3. City of Herrin shall immediately take all necessary action toward obtaining all required permits from the Environmental Protection Agency for operation of the landfill.
4. City of Herrin shall, within 45 days of the date of this Order, apply two feet of compacted final cover over the entire surface of each portion of the completed final lift at the Herrin landfill. In addition, City of Herrin shall place a compacted layer of at least six inches of cover material on all exposed refuse at the end of each day of operation.
5. For a period of 90 days from the date of this Order City of Herrin shall cause the oil sludge materials from the Fedders-Norge plant to be deposited at its landfill in the afternoon of each working day and shall spread the oil sludge material over the previously deposited and compacted daily refuse. Thereafter, as directed in Part 4 above, all refuse and oil sludge material shall be properly covered. If, during this 90 day period, the City of Herrin receives a permit from the Agency for such operation, all subsequent operations shall conform to the permit and conditions attached thereto. The City shall not accept liquid or hazardous materials from Fedders-Norge after said 90 day period unless a permit has been issued by the Agency authorizing the City to do so.
6. Fedders-Norge shall pay to the State of Illinois by June 1, 1974 the sum of \$500 as a penalty for the violations found in this proceeding. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois EPA, 2200 Churchill Road, Springfield, Illinois 62706.
7. Fedders-Norge shall continue and fully implement within 30 days of this Order its Waste Oil Management System Implementation Plan as presented in this proceeding.
8. In the event the City of Herrin fails to obtain a permit to receive the waste from Fedders-Norge

pursuant to Rule 203 or Rule 310, Chapter 7, Solid Waste Rules and Regulations within the 90 day period specified in Paragraph 5, Fedders-Norge shall cease and desist from depositing liquid materials at the Herrin landfill. During said 90 day period the deposition of liquid materials at the Herrin landfill shall be as specified in Paragraph 5 of this Order.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 25<sup>th</sup> day of April, 1974 by a vote of 5 to 0.

Christan L. Moffett