

ILLINOIS POLLUTION CONTROL BOARD
October 17, 1980

ENVIRONMENTAL PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 78-198
)
A & F MATERIALS COMPANY, INC.,)
)
Respondents.)

PATRICK CHESLEY AND BRIAN E. REYNOLDS, ASSISTANT ATTORNEYS GENERAL,
APPEARED ON BEHALF OF COMPLAINANT.

RAY FEHRENBACHER APPEARED ON BEHALF OF RESPONDENT.

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on the January 23, 1980 motion of the Environmental Protection Agency (Agency) for a determination pursuant to paragraph F of the stipulation and in accordance with Rule 334(b)(1) as to whether Respondent A & F Materials Company, Inc. (A & F) should receive relief from the final Order of the Board entered against A & F in EPA v. A & F Materials Company, Inc., PCB 78-198, 32 PCB 431, (January 18, 1979). By its Order of February 7, 1980, the Board authorized hearing on this motion. Because of the inability of the hearing officer to get Respondent to agree on earlier hearing dates, hearing was not held until August 19, 1980 (see Hearing Officer Order of July 25, 1980). No members of the public were in attendance.

The Board's Opinion and Order of January 18, 1979, from which relief is sought, accepted a stipulation and proposal for settlement of an enforcement action instituted by the Agency on September 20, 1978. In this stipulation, filed November 20, 1978, A & F admitted that it had engaged in the operation of an unpermitted holding lagoon facility in Richland County, Illinois, that it had continued to do so even after both written and verbal notification from the Agency, and that it had caused or allowed the discharge of contaminants into a water of the State, i.e. an unnamed tributary of the Fox River. The facility was constructed by A & F on or after July 6, 1976, and "was designed to store, without discharging, rolling oil and alum type substances for ultimate refining and recovery operations (Stip 2).

The provisions of the stipulation at issue here, which were incorporated into the Board's Order, 32 PCB at 433, by reference as if fully set forth, are these:

"Proposed Terms of Settlement"

* * *

D. The Respondent agrees that by no later than December 1, 1978, the Respondent will have pumped and completely emptied the holding lagoon facility described in paragraph 2, supra, to include the removal of all residue of substances previously stored therein.

E. The Respondent further agrees that by no later than December 15, 1978, the Respondent will have completely filled, covered, and leveled the holding lagoon facility described in paragraph 2, supra.

F. Respondent's obligation to meet the time requirements set out in paragraphs D and E, supra, shall be extended as the result of an act of God or by a circumstance agreed to by the parties. Prompt written notice of the claimed applicability of this provision must be give to Agency by the Respondent, or a claim for extension based upon a given set of facts is waived. Should the parties fail to agree on what circumstances shall excuse a delay in the performance or on the period of extension due, Respondent may submit the matter to the Board for resolution after a hearing which may be called or requested by either the Agency or the Respondent, or both, in accordance with Board Procedural Rule 334(b)(1).

H. Respondent agrees to pay a civil penalty in the amount of \$1,100... (Stip. 4-5 emphasis in original)

* * *

As the Board had received no information to the contrary, the Board assumed that the clean-up of the site had taken place prior to the entry of the Board's Order. Such apparently was not the case. In its motion of January 23, 1980, the Agency alleges that A & F failed to meet the time requirements of D & E, states that it does not agree with Respondent that the delay is excusable, and seeks a determination of this issue by the Board pursuant to paragraph F of the stipulation.

The uncontroverted evidence adduced at hearing is that A & F had not completely emptied the holding lagoons at the facility and had not filled, covered or leveled them, as of the date of hearing. The Agency's photographic exhibits (Comp. Ex. 2-8) and the diagram (Ex. 1) and testimony of its employee-witness, environmental protection specialist, Dwight Hill, show that 5 lagoons, or pits now exist on the property at issue, the Alva Runyon farm in Olney, Illinois. While the Board could simply note this fact and proceed to discuss the reasons offered for non-compliance, it feels that this opinion should set forth the condition of the holding facility as of August, 1980.

The area of concern is bounded on the north and east sides by streams. At the junction of these two streams is a logjam, the waters of which appeared to contain globules of oil (Comp. Ex. 8, R. 32-36). Kenneth Ault, president of A & F, testified that of the 5 pits so bounded, only what were described as pits 2 and 3 were constructed by A & F. The other 3 pits were created by overflow into adjacent naturally occurring or manmade depressions. These three overflow pits contained surface run-off, supernatant exhibiting an oily sheen, and some solids (R. 51, 18, 28-29).

It was Mr. Hill's testimony that on August 5 and 19, 1980, that pit 2 was "brimful," with an eight to ten inch crust of oil and some type of solid covering approximately 99% of the pit's surface. Pit 3, which was full to the berm top, had a crust similar to that of pit 2 covering 50 to 60% of its surface, and the visible liquid had an oily sheen (R. 64-65, 21-22, 24).

The testimony of Kenneth Ault concerned reasons for A & F's failure to perform the duties stipulated to on or before December 15, 1978. It is first important to note that overflow pits 1 and 5 did not contain liquids in late 1978 - early 1979, although pit 4 contained a "bad smelling sludge" even at that time. Ault testified that, due to bad weather, no work at all was performed until April of 1979. In April-May, 1979, 60,000 gallons of sludge and water were removed from pits 2 and 3. Mr. Ault estimated that as of June 6, 1979, 40,000 gallons of sludge remained to be removed from the pits. No work has been performed since June 6, 1979 (R. 52-53, 66-67).

The sludge and water removed from pits 2 and 3 was taken for processing to an A & F oil recycling plant located in Greenup, Cumberland County, Illinois, and A & F had anticipated to so handling the remaining sludge. However, on June 6, 1979, A & F was enjoined from operation of the Greenup facility by a preliminary injunction entered in Niccum v. A & F Materials Co., Inc., 79 CH 3 (Cumberland County Circuit Court 1979) (Resp. Ex. 1). The Niccum order stated that "unless the Defendant is enjoined from impregnating the air with disagreeable, unwholesome, offensive and noxious odors" that plaintiffs would suffer irreparable harm to their health, enjoyment of life and use of their property. Since June 6, 1979, Greenup's operations have been enjoined by this and other unspecified orders. The litigation concerning Greenup continues to pend (R. 53-58).

Following the injunction of recycling at Greenup, A & F made no inquiries concerning alternative means of disposal of sludge from the Runyon farm pits (R. 76-77). It is A & F's position that recycling this waste to remove saleable oil at Greenup is the only economically feasible way of disposing of it. Mr. Ault testified that A & F's only assets are that portion of the Greenup property containing sludge storage pits (the balance of the property and the processing plant having been sold to Genet Refining and Recovery R. 68-70), and whatever value may be left in a certain lease contract with Genet (R. 80).

At no time has A & F petitioned for an extension of time pursuant to paragraph F of the stipulation, which stipulation was executed by Mr. Ault himself on A & F's behalf (R. 50-53, 66-67). Mr. Ault believes that the stipulated penalty was paid, but since his paperwork is in "terrible shape," he cannot produce evidence to counter the State's record that no fine was paid (R. 58-59, 75).

On the record before us, the Board cannot find excusable A & F's delay in complying with its own stipulation of November, 1978 and the Board's Order of January 18, 1979. Despite the parties' failure to inform the Board that the stipulation's timetable had been violated even before entry of the Order accepting it, the Board might have excused non-performance during the winter months of 1978-1979, the unusual severity of which the Board takes official notice. However, as the Agency points out, the stipulation entered into by A & F in late October of 1978 (R. 83) promised that the lagoons would be emptied in little more than a month, i.e. by December 1, 1978. A & F has made no adequate explanation for its failure to complete this one month job in April and May of 1979.

As a result of A & F's lack of activity, further environmental degradation has occurred. A & F has made no representation concerning when, if ever, it would bring this site into compliance (R. 86). Under these circumstances, no purpose would be served by granting A & F an extension of time in which to comply, and the Board will not do so.


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

ORDER

Pursuant to Procedural Rule 334(b)(1), and of Paragraph F of the parties' Stipulation and Settlement of November 20, 1978, the Board hereby denies A & F Materials Company, Inc., a) an extension of time to comply with the Board's Order of January 18, 1979 and b) any other relief from that Order.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 17th day of October, 1980 by a vote of 4-0.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board