ILLINOIS POLLUTION CONTROL BOARD
April 21, 1994

ALBERT WARNER, Complainant, v. WARNER BROS. TRUCKING, INC. and URBANA & CHAMPAIGN SANITARY DISTRICT, Respondents.	)	PCB 93-65 (Enforcement)

JOHN B. HENSLEY APPEARED FOR COMPLAINANT;

KENT FOLLMER APPEARED FOR RESPONDENT WARNER BROS. TRUCKING, INC.;

MARC J. ANSEL APPEARED FOR RESPONDENT URBANA AND CHAMPAIGN SANITARY DISTRICT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter is before the Board upon a formal complaint filed on March 29, 1993 by Albert Warner (Albert[1]). Albert alleges that respondents Warner Bros. Trucking, Inc. (WBTI) and Urbana & Champaign Sanitary District (District) have violated provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992)) and the District's Permit for Land Application of Sewage Sludge. On April 19, 1993 the District filed its answer to the formal complaint.

Hearing was held on June 29, 1993 in Champaign, Illinois, before hearing officer Arnold Blockman. Closing arguments were reserved for briefs. Albert filed his brief[2] on August 23, 1993. The District filed its brief on October 12, 1993. WBTI filed its brief on October 25, 1993. Complainant's reply brief was filed on November 15, 1993.

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[1] The shortforms used herein comport with those used by the parties in their own pleadings.

[2] The various briefs are each characterized by the filing parties as "closing argument" in the case of complainant's and respondents' briefs and "rebuttal argument" for complainant's reply brief.

ALLEGED VIOLATIONS AND BACKGROUND

Albert alleges that the respondents violated section 9(a) of the Act, and conditions 5(c), 6(a)(1), 6(a)(2), 6(c), 6(h), and 6(j)(2) of the District's permit for Land Application of Sewage Sludge (Permit No. 1992-SC-0763, issued May 27, 1992). (Compl. Br. at 4-9[3].) (Complaint at 3.) Albert alleges that violations occurred in Rantoul Township, Illinois, in township sections 9, 18, and 20. For section 9, he alleges that violations occurred in November and December 1992. For section 18 he alleges that violations occurred in 1990 and 1991. Further violations are alleged to have occurred in December 1991 and February 1992. For section 20, he alleges generally that the hauling and dumping practices occurred in three principal timeframes from late February until May, July, and September until November, all in 1992. (Compl. Br. at 1-4.)

Albert requests as relief that the Board order WBTI and the District to cease and desist from violations of the Act and the terms of the District's permit[4], and to assess penalties against respondents as appropriate. (Complaint at 5, Compl. Br. at 11.)

Albert lives in a farmhouse on a two-acre parcel of land in the northwest corner of section 20. The remainder of the tract is owned by Albert's mother, Justena Warner. Albert is the brother of Joe Warner and Gene Warner, owners of WBTI, but Albert has no ownership or other interest in the business. (Compl. Br. at 1-2.)

Sludge Operations, WBTI, and Evidentiary Matters

The District administers a program for the distribution of dried sewage sludge to the general public, for application on farm land. (Tr. at 127.) This sludge is hauled from the District's facilities to farm fields by independent contractors or by the District's own trucks (Tr. at 143.)

Although Albert testified that all the sludge that is the subject matter of this litigation was hauled by WBTI (Tr. at 42), he also testified that some sludge was hauled by other trucking companies. (Tr. at 63-65.) The District witness testified that at the present time, WBTI hauls all the dried sludge in the District's farm distribution program, though they also use their

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[3] Violations of Sections 12 and 21 of the Act were also alleged in the complaint. However, these alleged violations were not pursued in closing argument at hearing and brief. Therefore, the Board deems these allegations waived.

[4] The permit is included in the record as Respondent's Exhibit C.

own trucks. (Tr. at 143.) The District determines the precise location where dried sludge is to be stockpiled based on maps showing where crops aren't being grown. (Tr. at 144.) The District's employees perform the sludge application in the fields. (Tr. at 145.) Truckloads were brought in tractor-trailers, with watertight boxes, each having a capacity of 24 tons. (Tr. at 55.) WBTI witness Joseph Warner testified that the District tells him where to haul and dump the sludge, that he is not involved in the determination of the location or amount of sludge to be dumped, and that WBTI does not perform the spreading of the sludge. (Tr. at 107-109.)

As an initial matter and based on these facts, the Board dismisses WBTI as a respondent in this proceeding for all allegations of violations of the District's permit. The Board finds that the District is the only entity that can violate its permit. The record does not indicate that the haulers have permits from the Agency, nor are they permitted via the District's permit.

In addition, Albert requested that the Board reverse its hearing officer's ruling excluding exhibits G1 and G2. These exhibits are video tapes allegedly depicting sludge handling practices. The hearing officer denied the admission of these tapes because they are cumulative of the photographic evidence, are beyond the scope of rebuttal, and are not easily amenable to the interposition of objections by the Respondents. (Tr. at 202-203.) The Board upholds the ruling of its hearing officer.

DISCUSSION

A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. This standard of proof requires that the proposition proved must be more probably true than not. Once the complainant presents sufficient evidence to make a *prima facie* case, the burden of going forward shifts to the respondent to disprove the propositions. (Illinois Environmental Protection Agency v. Bliss (August 2, 1984), 59 PCB 191, PCB 83-17.)

We now turn to each alleged violation and address its merits.

> Condition 6(j)(2) - Off-site interim storage of dried sludge in excess of two months shall not be allowed. In addition, measures shall be taken to contain runoff and leachate from any dried sludge that is stored.

In its answer, brief, and at hearing, the District admits to violations of condition 6(j)(2) as it pertains to storage longer than two months that occurred before January 1993. (Answer at 1; Resp. Br. at 4, 6.) The District states that after conversations

with the Agency, it now complies with this condition. (Tr. at 152-156.) The District further asserts that no harm has been done by its failure, prior to 1993, to comply with this condition. (Resp. Br. at 6.)

Condition 6(c) - Sludge shall not be applied to land which lies within 200 feet of * * * surface waters or intermittent streams * * *

Albert testified that sludge was stockpiled in 1990 and 1991 in section 18 right up to a swale, and that some was within the swale. He further described ponding that occurred as a result of the stockpiling of sludge close to or within the swales. (Tr. at 45-46.) He also testified that he observed stockpiled sludge in section 20 within 80 feet of a swale. (Tr. at 57, 60.) Also, photograph 21 of exhibit B shows sludge stockpiled up to a swale. This was identified as Section 20 (Exh. B, Photo 21; R 78-79.) Albert also testified that when the sludge was stockpiled, it disrupted the drainage flows and caused ponding to occur in the fields at Section 20. He stated that photograph nos. 77 through 96 show "ponding water that's created from stockpiled sludge that's stopping the natural flows of water". (Tr. at 39-40, 41.) Albert testified that the sludge that was stockpiled in Section 20 in 1992 was spread in November and December and incorporated in January 1993. (Tr. at 69.) He stated that the District "spread it in water and they spread it around the ponding water". (Tr. at 71.)

Prior to the time of the filing of this complaint, the District also had discussions with the Agency regarding what constitutes an "intermittent stream". Both the Agency and the District would conclude that grassy waterways or field swales would constitute "intermittent streams". (Tr. at 156-157.)

In addressing whether the District is in violation of condition 6(c), the District does not deny that it stockpiled sludge within 200 feet of a swale. Rather the District attempts to make a distinction between application and storage of sludge. The District implies that it is allowed to store sludge within 200 feet of an intermittent stream, with the only consideration being containing and controlling the runoff (condition 6(j)). According to the District, this is distinct from application of the sludge within 200 feet of that same stream (condition 6(c)).

Application is defined at 35 Ill. Adm. Code 391, the Agency's Design Criteria for Sludge Application on Land, as the placement of sludge on or under the land surface. Since the District placed the sludge on the land surface during the process of storing, the 200-foot-limit contained in condition 6(c) would pertain. The Board finds the District in violation of condition 6(c) of its permit for the time period alleged.

Condition 5(c) - Only dried sludge shall be distributed to the general public

Albert alleges that wet sludge was distributed to the general public in violation of the District's permit. He testified that sludge dumped on both sections 18 and 20 was "so liquid that it would run and spread out in a big wide, flat area approximately 10 to 12 inches deep". (Tr. at 66.) He further testified that prior to his retirement he worked as the superintendent of the Village of Rantoul landfill for 25 years (Tr. at 26), and that in his work for the Village of Rantoul sludge that was as wet as that dumped in sections 18 and 20 would have been rejected for disposal as too wet. (Tr. at 67.)

The District testified that only dried sludge has been distributed to the public (Tr. at 131.) Section 391.102 of the Agency's Design Criteria defines dried sludge as dewatered "such that it can be transported and handled as a dry material", with a minimum of 15% total solids, and that liquid sludge is "readily pumpable and must be transported in a closed vessel" with a maximum of 8% total solids. The District argues that Albert presented no evidence of the actual moisture content of the sludge, therefore he has failed to show that the sludge was distributed as liquid and not dried.

The Board finds that Albert has not presented sufficient information for it to conclude that the sludge was not dewatered as required. The Board is not finding that the only manner Albert could have proven a violation was to enter onto the field and have samples taken for the moisture content of the sludge. However, even considering Albert's experience at the Rantoul landfill[5], his observations at best are suggestive of a problem and would lead one to further investigate whether a violation is occurring, but are not specific enough to prove that a violation actually occurred.

Conditions 6(a)(1) and (2) - Sludge shall be applied to sites within the following guidelines: (1) - Sludge shall not be applied to sites during precipitation; (2) - Sludge shall not be applied to sites which are saturated or with ponded water * * *

Albert testified that the respondents spread sludge in November 1992 in section 20 when field conditions were muddy and during extremely wet weather, also spreading some during a rainfall event. He further stated that there was ponding of the water. (Tr. at 67-69.) He testified regarding section 9 that the sludge was dumped in November 1992 and spread in November or

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[5] Albert did not testify as an expert in this regard. (Tr. at 67, 72.)

December 1992. He described that respondents spread the sludge around the ponding water and also made ruts in the field, not incorporating the sludge until January 1993. (Tr. at 70-71.)

The District argues that the purpose of this condition is to minimize runoff and that there is no evidence that runoff has occurred. The District argues that they have never had a complaint from a property owner utilizing their sludge concerning wet field conditions during application. The District adds that 1992 was a record year for precipitation. (Resp. Br. at 5; Tr. at 163.)

Unlike the previous alleged violation, the Board finds that Albert has presented sufficient evidence to make a *prima facie* case. The Board also finds that the District has not presented any evidence disproving the allegations, and has not even affirmatively denied depositing sludge in the manner alleged by Albert. Based on Albert's unrebutted testimony, the Board finds that the District violated conditions 6(a)(1) and (2).

> Condition 6(h) - The delivery and application of sludge, and the choice of an application site, shall be made so as to minimize the emission of odors to nearby residents taking into account the direction of the wind, humidity and day of the week.

Albert alleges that sludge was delivered throughout the summer of 1992 without regard to precipitation, weather conditions, and ground saturation. Albert testified that the District hauled the sludge close to his house and that the odors worsened in the extreme wet weather. (Tr. 72-73.) Albert further testified that in the Spring of 1992 and "after it started warming up" (Tr. at 73), he was unable to use his yard for recreation and that he was unable to open the windows in his house due to the presence of odors. (Id.)

The District argues that this condition provides that in the delivery and the application of sludge, choices be made to minimize odors, but that it is not required that odors be eliminated. The District argues that Albert has not presented any evidence of what steps the District could have taken to minimize the emission of odors. (Resp. Br. at 6.)

The Board finds that the condition contains some steps the District could have taken to minimize the emission of odors, including making choices based on the direction of the wind, humidity, and the day of the week. The District fails to present an adequate defense of how it has acted in accordance with this condition to minimize the emissions of odors. The Board finds that the District violated condition 6(h) by failing to act to minimize the emission of odors.

> Section 9(a) of the Act - No person shall: (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Albert alleges that respondents violated Section 9(a) of the Act by causing the emission of contaminants to cause air pollution. Air pollution is defined in Section 3.02 of the Act as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. Section 3.06 defines a contaminant as any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

Dust

Albert alleges that during "dry summer months", especially July (1992), WBTI's truck traffic along the access road to section 20 created an extreme dust problem. (Tr. at 64-65, Exh. B, Photos 22-24, 71.) A portion of the testimony relevant to the air pollution by dust allegations are as follows:

> Q. * * * Did the dust created by these dumping or hauling operations create any problems for your family in 1992?
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> A. The only problem it created is we left the windows open one day and we didn't know they was going to haul that day and we come home that night and the dust had got in the house. But the rest of the time we kept our house shut up and run the air conditioning. (Tr. at 74.)

The District asserts that Albert has not presented sufficient evidence to establish a violation of the air pollution provisions of the Act or regulations promulgated thereunder.

The Board finds that pertaining to the dust, the record does not support a finding that the dust created by the truck traffic "created a presence in the atmosphere of one or more contaminants in sufficient quantities and of such duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property", and hence cause air pollution. Although the photographs do depict trucks and dust, there is no causal connection established between those trucks and air pollution in the testimony. The testimony only indicates that on one occasion Albert found dust

in his house. The closing of the windows and running of the air conditioning is also not affirmatively connected to the presence of dust. This testimony is further insufficient to establish that the dust occurred in such duration as to be injurious to life, or to unreasonably interfere with the enjoyment or use of the property. (See also, Madoux v. Straders Logging and Lumber Mill (May 21, 1991) PCB 90-149, 132 PCB 1227).

Odors

Albert incorporates his allegations and testimony regarding odors as indicative of air pollution that occurred at or near his home. As stated above, Albert testified that in the Spring of 1992 "and after it started warming up" (Tr. at 73), he was unable to use his yard for recreation and that he was unable to open the windows in his house due to the presence of odors. (Tr. at 72-73.)

The unrebutted testimony establishes an interference with Albert's enjoyment of life, and that such interference was caused by the odors from the sludge application operations of the District occurring in 1992. However, the Board will evaluate the factors set forth in Section 33(c) of the Act to determine if such interference was unreasonable, together with an evaluation of all alleged violations.

For the allegations of violation of Section 9(a) of the Act, the Board finds that since WBTI personnel did not apply the sludge, the Board makes no findings of violation against WBTI.

Animal Injury

Lastly, Albert alleged that the sludge handling operations caused the death of his dog. The Board finds that Albert has not pled which provision of the Act, Board regulations, or permit would have been violated by the injury to his dog. Moreover, the evidence presented on this issue was excluded by the hearing officer as hearsay, leaving nothing for the Board to consider on this issue. The Board upholds the hearing officer's action in rejecting the hearsay testimony. Complainant asks the Board to consider the testimony, yet admits that the hearing officer's action was proper. (Compl. Br. at 10.) Therefore, the Board finds no violation for the alleged animal injury.

SECTION 33(C) FACTORS

In arriving at its findings and determinations, the Board is charged under Section 33(c) of the Act to take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits resulting from the pollution source. Such consideration is to include:

1) The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2) The social and economic value of the pollution source;

3) The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

4) The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5) any subsequent compliance.

Regarding the alleged violations of Section 9(a) of the Act, the Board considers that Albert testified that the odor interference occurred in the Spring of 1992 and "after it started warming up". (Tr. at 73.) This was in response to counsel's inquiries regarding the specific timeframes of the odor occurrences. While the Board has found that an interference with Albert's enjoyment of life from the odors has occurred, the Board must consider that finding in the context of Section 33(c) factors, most specifically Section 33(c)(1). The Board finds that the record is not sufficiently clear to establish the duration of the odor occurrences and degree of injury such as to find that the odor unreasonably interfered with the enjoyment of life and property. Accordingly, the Board finds that the record does not support a finding of violation of Section 9(a) of the Act.

Also in the context of Section 33(c)(1), the Board finds that the District's violations of its permit are serious.

For Section 33(c)(2), the land application and interim storage of dried sludge has economic and social value. Such value includes saving of landfill space or other means of disposal and also allows for fertilization of fields at low cost. However, that value is diminished when permit provisions for application and storage are not followed and the sludge is misapplied or improperly stored, resulting in actual and threatened pollution.

Albert's residency appears to predate the application of sludge on the neighboring properties and has priority of location, as such bears on Section 33(c)(3). Land application of sludge is suitable on farm fields if done according to the terms

of the permit. Albert's residency and the land application of sludge can coexist if the land application is done according to the terms of the permit.

Regarding the technical practicability and economic reasonableness of the pollution source (Section 33(c)(4), the record indicates that the District did not challenge the conditions of the permit at the time it was issued. Therefore the Board assumes that compliance with the permit is technically practicable and economically reasonable. Regarding odors resulting in air pollution, techniques for minimization of the odors are contained in the permit. The Board assumes that these procedures, having been accepted by the District when it agreed to abide by the permit, are technically practicable and economically reasonable.

As regards Section 33(c)(5), the District states that it is in compliance with condition 6(j)(2) after consultation with the Agency in January 1993. (Resp. Br. at 3.) The record contains no evidence that the District has complied with the remainder of the conditions for which the Board has found the District in violation. However, the record does not disclose that these violations are continuing.

CONCLUSION

Based on the above, the Board finds the District violated conditions 6(j)(2), 6(c), 6(a)(1), 6(a)(2), and 6(h) of its permit for land application of sewage sludge. For the remainder of the allegations, the Board finds no violation against the District. The Board finds no violation against WBTI.

REMEDY

Section 42(h) Factors

Since Albert has asked that penalties be assessed against the District, the Board will address whether penalties are warranted. In so doing, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty as listed in Section 42(h) of the Act:

1) The duration and gravity of the violation;

2) The presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

3) Any economic benefits accrued by the violator because of delay in compliance with requirements;

4) The amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5) The number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

Upon review of the Section 42(h) factors, the Board finds that the duration of the violations is minimal and the gravity of the violations is serious. There is no evidence in the present record that the District has failed to exhibit due diligence once the violations were discovered. To the contrary, the District's ready compliance with the Agency's suggested interpretations of the District's permit shows due diligence.

The District has probably accrued some economic benefit from violation of sludge application requirements, especially concerning condition 6(j)(2). This is evident since the District did not incorporate or apply the sludge as often as it would have had it complied with the stockpiling limitations prior to 1993. However, any economic benefit appears to be minimal. Also, there is no evidence of prior adjudicated violations of the Act against the District.

Based on the record as a whole, the Board believes this case has caused the District to critically consider its sludge disposal activities pursuant to its permit. Therefore, the Board finds that a monetary penalty[6] is not necessary to deter future violations of the Act and permit at this time. Accordingly, no penalty will be assessed at this time. However, should the District in any subsequent proceedings be found to be in violation, the Board may reassess this position.

The Board believes it is the appropriate remedy at this time to order the District to cease and desist from further violations.

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[6] The Board observes that the complainant did not ask for or argue for the imposition of penalties either in his complainant or at hearing. The only reference to a penalty in complainant's case occurs as the final phrase in the Complainant's Brief where the Board is asked "to assess penalties against each Respondent, as the Board deems appropriate" (Compl. Br. at 5).

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

ORDER

The Board finds Urbana and Champaign Sanitary District violated conditions 6(j)(2), 6(c), 6(a)(1), 6(a)(2), and 6(h) of its permit for land application of sewage sludge. For the remainder of the allegations, the Board finds no violation against the Urbana and Champaign Sanitary District. The Board orders the Urbana & Champaign Sanitary District to cease and desist from future violations.

The Board finds no violation against Warner Bros. Trucking Inc., and orders that Warner Bros. Trucking, Inc. be dismissed from this action.

IT IS SO ORDERED.

Board Member G. Tanner Girard concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of April, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board