

ILLINOIS POLLUTION CONTROL BOARD
June 7, 1990

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Complainant,)
)
v.) AC 89-131 (Dockets A & B)
) (Administrative Citation)
) (IEPA No. 9711-AC)
ESG WATTS, INC.,)
Respondent.)

WILLIAM SELTZER, APPEARED ON BEHALF OF COMPLAINANT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

THOMAS J. IMMEL, IMMEL, ZELLE, OGREN, MCCLAIN, GERMERAAD & COSTELLO, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board upon a petition for review of an administrative citation filed by ESG Watts, Inc. ("ESG") on July 19, 1989. The citation alleges one violation of section 21(p)(5) of the Illinois Environmental Protection Act ("Act") and was served on ESG on June 15, 1989 by the Illinois Environmental Protection Agency ("Agency"). A hearing was held on October 6, 1989 at which three members of the public attended.

ESG is the operator of a sanitary landfill located in the Sangamon County, Illinois, operating the facility pursuant to Agency permit No. 1980-23-OP. On May 2, 1989, between 4:32 a.m. and 7:30 a.m., Ricky Lanham, an employee of the Agency's Land Control Division, inspected ESG's facility and viewed uncovered refuse from the previous working day in an area 125 yards in length and 25 yards in width in violation of section 21(p)(5) of the Act. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1021(p)(5).) Section 21(p)(5) of the Act provides that :

- (p) No person shall conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:

* * *

5. uncovered refuse remaining from any previous operating day or at the conclusion of any operating day, unless authorized by permit;

ESG does not contest the Agency's allegation that ESG violated section 21(p)(5) of the Act. Rather, ESG asserts that it was

weather conditions and equipment breakdowns prevented it from being able to excavate in its "borrow area" causing ESG to run out of cover material. (ESG Brief at 11; Tr. at 22.) Pursuant to section 31.1(d)(2) of the Act, ESG asserts that the violation resulted from "uncontrollable circumstances" and that, therefore, the Board must adopt an "order which makes no finding of violation and imposes no penalty." (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1031.1(d)(2).)

The Agency presented the testimony of Ricky Lanham who conducted the on-site inspection of ESG's facility. The bulk of Lanham's testimony concerned establishing that ESG violated section 21(p)(5) of the Act and is, therefore, irrelevant to the Board's determination of whether ESG established the existence of "uncontrollable circumstances." However, Lanham testified that, on the morning of his inspection, the active area of the site appeared dry, although he did not actually test the soil.. (Tr. at 20-21.) According to Lanham, there were two "ponded areas" at the site; one located between the active area where the uncovered refuse was found and the borrow area, and one located smaller pond located southwest of the active area. (Tr. at 20-21 ; IEPA Ex. 1.) Lanham opined that the ponds resulted from a collapsed berm in a creek running through the property. (Tr. at 20-21, 56-57.) Lanham testified that he viewed the borrow area from a distance of approximately 100 feet. (Tr. at 47.) Lanham stated that there was no standing water within the borrow area and that the soil in that area was not in a muddy condition. (Tr. at 86; IEPA Ex. 14.) Lanham opined that he did not know whether excavating equipment would have been able to get into the borrow area. (Tr. at 87.) However, Lanham testified that the road leading from the active area to the borrow area did not go through the pond. (Tr. at 88-89.) Relying on IEPA Ex. 2, Lanham stated that the road transversed the western most boundary of the site, continued north and then back within an area near the borrow area. (Tr. at 89.) Over ESG's objection, the hearing officer admitted IEPA's Ex. 16 consisting of a U.S. Department of Commerce "Local Climatological Data Monthly Summary" which lists negative to "trace" amounts of precipitation on April 30 through May 2, 1990. This data was collected at the National Weather Service Office located at Capitol Airport in Springfield, approximately three miles from ESG's site. (IEPA Ex. 16; Tr. at 175.)

ESG presented the testimony of Leonard Foulks, operations manager for ESG. (Tr. at 95.) Foulks testified that it was ESG's practice to stockpile cover material, taken from Area II (i.e., the "borrow area"), at the edge of the active area (i.e., the area of the violation) on a daily basis. (Tr. at 108.) However, on May 1, 1990, there was not enough cover material stockpiled because the two "scrapers" (i.e., machinery for moving the cover material from Area II to the active area) were not functional. (Tr. at 109, 153.) One of the scrapers needed a rear differential which was on order and the other scraper had blown a tire on the morning of May 1st. (Tr. at 97-99.) Foulks further testified that, even if the

scrapers had been working, additional cover material could not be removed from the borrow area to the active area because "it was too wet." (Tr. at 104, 109.) According to Foulks, it had rained heavily on May 1st, the day before the inspection. (Tr. at 102, 105.) Regarding the ponded area, Foulks stated that the area was not "ponded" until it rained, causing the berm of the creek to collapse. (Tr. at 113-14.)

On cross-examination, Foulks testified that he was not present at the facility on May 1st or 2nd, having gone home to Rock Island. (Tr. at 133-34.) Cross-examination revealed that any information Foulks had as to the weather and soil conditions on May 1st, as well as information relating to any attempt to provide daily cover came from Dennis Hudson, ESG's supervisor, who was present at the site on May 1st and 2nd. (Tr. at 136.) According to Foulks, Hudson told him that, on May 1st, there was an attempt to apply cover with whatever dirt was stockpiled, but there was not enough stockpiled dirt to completely cover the refuse. (Tr. at 147-48, 151-52.)

DISCUSSION

ESG contends that it established that its failure to apply daily cover was due to uncontrollable circumstances. ESG asserts that, even if its equipment had been working properly, wet soil conditions prevented ESG from being able to excavate soil from the borrow area and transport it to the active area to apply cover. Contrary to Lanham's testimony that he did not view standing water in the borrow area, IEPA Ex. 14 (which is also ESG's Ex. 2) clearly shows puddles of water in that area. While IEPA Ex. 16 shows that little to no rainfall occurred in Springfield on the day before the inspection, this does not conclusively establish that there was no precipitation at ESG's facility three miles away. However, the fact that ESG's sole witness was not present at the site when the rain allegedly occurred, but rather testified from what he was told by one of ESG's employees, does not strengthen ESG's defense.

Based upon Foulks' testimony, on the day before the inspection ESG was able to apply whatever dirt was stockpiled at the foot of the active area. Therefore, even accepting that wet soil conditions prevented ESG from excavating and transporting soil from the removal area on May 1st, the Board must decide whether ESG's failure to stockpile enough dirt in the event that soil conditions barred access to the borrow area resulted from "uncontrollable circumstances." Here, the two pieces of equipment (i.e., the scrapers) that could move the dirt from the borrow area to the active area were not working; one scraper broke down at least three days prior to the inspection and the other had a flat tire on May 1st, the day before the inspection on May 2nd. Consequently, one scraper was working until two days before the inspection. It appears that ESG waited too long to stockpile more dirt even though its supply of dirt in the active area was running low. Here, the

weather conditions did not prevent the application of daily cover, but rather prevented ESG from carrying out its system of stockpiling. While recognizing that weather conditions can lead to a valid claim of uncontrollable circumstances in relation to violations of section 21(p)(5), ESG has not adequately persuaded the Board that such uncontrollable circumstances were the main factor preventing ESG from complying with the Act. The use of poor judgment in the amount of dirt needed to be stockpiled is not tantamount to an "uncontrollable circumstances" as contemplated by the Act.

Based upon the foregoing, the Board finds that ESG has violated section 21(p)(5) of the Act on May 2, 1989 by failing to provide daily cover. Furthermore, the Board rejects ESG's claim that the violation resulted from uncontrollable circumstances.

Pursuant to section 42(b)(4) of the Act, the Board hereby imposes a \$500 penalty upon ESG for violating section 21(p) of the Act. For purposes of review, today's action constitutes the Board's final action on the matter of the civil penalty.

DOCKET B

Pursuant to section 42(b)(4) of the Act, any person found to have violated section 21(p) of the Act is required to pay hearing costs incurred by the Board and by the Agency. The Clerk of the Board and the Agency are therefore ordered to file a statement of costs, supported by affidavit, with the Board and with service upon ESG. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order addressing the issue of costs.

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

ORDER

- 1.) The Board finds that respondent ESG Watts, Inc. has violated section 21(p)(5) of the Act as alleged in the complaint and respondent is therefore ordered to pay a statutory penalty of \$500.
- 2.) Within 45 days of the date of this order of June 7, 1990, respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

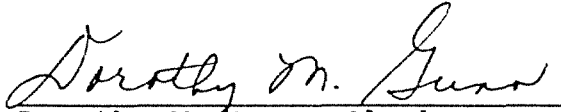
Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Il. 62706

- 3.) Docket A is hereby closed.
- 4.) Within 30 days of the date of this order, the Agency and the Clerk of the Board shall file a statement of costs, supported by affidavit, and with service upon respondent. Such filings shall be entered in Docket B of this matter.
- 5.) Respondent is hereby given leave to file a reply/objection to the filings as ordered in 4.) within 45 days of the date of this order of June 7, 1990.
- 6.) Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1041) provides for appeal of final order of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. Dumelle dissents.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of June, 1990, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board