

ILLINOIS POLLUTION CONTROL BOARD
May 13, 1982

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
 Complainant,)
)
 v.) PCB 80-125
)
 A. J. WELIN,)
)
 Respondent.)

MARY JO MURRAY, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINT.

CLIFFORD E. STONER, PEDDERSON, MENZIMER, CONDE, STONER & KILLOREN, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by I. Goodman):

This matter comes before the Board upon a complaint filed by the Illinois Environmental Protection Agency (Agency) on July 1, 1980. The complaint alleges that since July 2, 1977 the Respondent, Allen J. Welin (Welin), violated Section 21(a) of the Illinois Environmental Protection Act (Act) and Rules 201, 202(a), 301 and 305(c) of the Pollution Control Board Rules and Regulations, Chapter 7: Solid Waste. For the period of the complaint, Welin is alleged to have owned 2.83 acres of vacant land north of the City of Belvidere, Boone County, Illinois and to have allowed open dumping of refuse thereon. Welin is also charged with failing to obtain a waste site developmental permit, failing to obtain a waste site operating permit, and since at least November 17, 1977 failing to provide final cover over portions of this triangular shaped site.

On March 13, 1981, the Agency filed a Motion for Leave to File an Amended Complaint and an Amended Complaint to join the National Division of the Moline Corporation as a party-respondent. On April 27, 1981, the Hearing Officer denied the Agency's motion to amend. On May 6, 1981, the Agency filed a Motion for Leave to File an Interlocutory Appeal from the Order of the Hearing Officer and a Motion for Continuance of the Hearing. On May 14, 1981, the Board denied the appeal, while granting an extension of the hearing date. On May 28, 1982, the Agency filed a Motion for Consolidation of this case with PCB 81-88, EPA v. National Division of Moline Corp, which the Board denied on June 10, 1981.

Hearings were held on October 9, 1981, October 29, 1981, and November 10, 1981. The Respondent's Motion to Dismiss at the Close of Petitioner's Evidence, filed on December 1, 1981 is hereby denied. On January 4, 1982 the Agency timely filed its Closing Argument. Respondent's closing brief was due January 6, 1982 but never filed. On January 21, 1982, the Agency filed a motion to close the record. On February 4, 1982, the Board granted the Agency's motion and closed the record in this proceeding.

At hearing the Agency presented three witnesses who testified about the inspections each had conducted at the Welin site. Between June 28, 1977 and October 20, 1981 the site had been visited at least sixteen times. The first witness, Clarence Bieze, a former Agency landfill inspector, testified that he inspected the site on March 21, April 26, May 10, and June 5, 1979 (R. 17-35). Bieze testified that concrete was present along the southeast edge of the property and foundry sand was located over the entire area, which was graded but without any surface cover. He found a rope barrier across the entrance to restrict access and no evidence of recent refuse dumping. Bieze saw no evidence of erosion due to gullies or depressions or of any leaching to the Kishwaukee River, which is approximately 100 yards from the southern boundary of this site. Supporting demonstrative evidence included three photographs and inspection reports (Compl. Ex. 1, 2, 3, 4, and 5).

Mark Hutson then testified that while employed by the Agency he had inspected the site on September 7, October 12, and November 14, 1979; and on January 21, February 14, and April 11, 1980 (R. 79-113). Hutson's testimony included basically the same observations recited by Bieze and that in addition, he had seen a bulldozer parked in one corner of the property, track marks across the property and sparse vegetation. Again, supporting demonstrative evidence included photographs and inspection reports (Compl. Ex. 6A-6G, 6I, 7 and 8).

Robert Wengrow, an Agency employee, testified that he conducted inspections of the site on June 28, August 26, and September 20, 1977; and on July 26, and October 22, 1979; and October 20, 1981. Foundry sand cores, concrete, metal, slag and some asphalt were visible at the site at each visit (R. 204-252). During the July 26, 1979 inspection Wengrow also noticed erosion gullies on the southern slope of the property (R. 213). On October 22, 1979 Wengrow noted that the southern slope of the property had approximately a one to one drop-off. He also observed that the site had been scraped since his last visit (R. 215). His testimony was also supported by one photograph and by inspection reports (Compl. Ex. 11 and 12).

Despite intermittent efforts by Bieze and Hutson during their inspections, they were unable to contact either Welin

or anyone at the Welin household, which was located across the street from the site. However, after each of these inspections, the Agency did send letters notifying Welin that the site needed a two feet final cover (Compl. Ex. B-H). During Wengrow's September 20, 1977 inspection, he spoke briefly with Welin explaining the necessity of a final cover (R. 211-212). During this same inspection, Wengrow took a surface composite sample of foundry sand from the site. This sample was later analyzed at the Agency's Chicago laboratory by Florence Lippe and Bernard Pontius (R. 450-514). In conducting a water leach test the sample was tested for certain parameters and the results as recorded were accepted into evidence as exhibit 13B, 16, 17A, and 17B (R. 450-514). Two and a half years later, on February 14, 1980, Hutson collected a composite sample of foundry sand from four different locations at the site (R. 95). This sample was analyzed at the Agency's Champaign laboratory by Steven M. Muir (R. 518-539). The results for the parameters tested in the pH5 leach test are contained in Exhibits 6H, 19A, 19B, and 19C.

Calvin Cooke, a former landfill manager of AAA Disposal Systems, Inc., testified that he had visited the Welin site twice, in December of 1978 and March of 1979, to inspect a D-7 Caterpillar bulldozer which was parked in the corner of the property. During the March, 1979 visit Cooke drove directly onto the property, there being no barrier (R. 166). While inspecting the bulldozer, he spotted foundry sand adhered to the machine's scraping blade (R. 173). During this same visit, Cooke witnessed a load of foundry sand being dumped on the site from a five-yard capacity green International dump truck (R. 187). He did not then know the identity of the driver, but later identified him to be William Roby (R. 169-171).

The Respondent Welin testified that he had never asked anyone to deposit refuse on his property or granted permission to anyone to do so. He also testified that he had never seen any evidence of dumping since he became the owner of the property in 1974, subsequent to his mother's death. He further stated that he had put up fence posts and rope to prohibit access to the property.

Five witnesses testified on behalf of Respondent. William Roby, a dump truck driver for the Moline Foundry from July 1978 until June 1979, stated that during this time he had hauled foundry sand to the Boone County Landfill and the AAA Landfill, but never hauled or dumped foundry sand on the Welin site (R. 363-365). Roby was, however, the man identified by Cooke to have been the driver of the dump truck he observed at the Welin site in March of 1979 (R. 169-171).

William Meyers, plant manager of the Moline Foundry which is located a mile and a half from the Welin site, testified that the foundry never dumped its foundry sand at the Welin site, but rather at the Boone County Landfill, the AAA landfill or the

Rockford Airport Landfill (R. 401-402). The Moline Foundry currently generates about 120 tons per week of foundry sand for disposal. Prior to the inauguration of its manifest system in February of 1980, there is no company record of how much foundry sand left the plant or where it was disposed (R. 382-3, R. 393-7).

James F. Cordray, who is involved in an excavating business with his brother, stated that he owned the Caterpillar bulldozer which was parked on the Welin property for about three years. He said it was used to level off the dirt and debris from his excavating business which he dumped on the Welin property prior to 1979 (R. 404-406). He asserted that he never saw anyone dumping foundry sand on the site and never saw the Moline Foundry's dump truck on the property (R. 406-407).

Robert Mickey, a grain merchant and farmer who lives about one mile from the Welin site, testified that he drives past the site about two to four times a day and has never seen the Moline Foundry's green dump truck on the property or dumping of foundry sand (R. 413). He indicated that he is familiar with foundry sand because he bought a bankrupt foundry adjacent to his grain operations. He stated that the Caterpillar bulldozer was usually just parked on the Welin property, rather than being actively utilized (R. 419).

The Respondent's expert witness, Thomas P. Kunes, P.E., of a consulting engineering firm specializing in waste management and environmental control, testified that he inspected both the Welin site and the Moline Foundry on September 11, 1981. He took samples of foundry sand from each place and performed an EP Toxicity Test for lead and cadmium and a Water Leach Test. Comparing the test results, Kunes concluded that it was reasonably certain that the foundry sand on the Welin site, at a depth he estimated to be eight to fifteen feet deep, came from the Moline Foundry (Resp. Ex. 1-5; R. 270-352). Additionally, Mr. Kunes stated that he believed any remaining leaching potential at the site to be insignificant and that the site posed no danger of any water contamination or environmental harm. Furthermore, he believed there was no need for additional cover, but rather the foundry sand itself should support revegetation.

The evidence provided by the Agency and Welin's witnesses establish that foundry sand, sand cores and construction material are present at the Respondent's site. These types of materials constitute solid waste pursuant to Chapter 7 definitions. Pursuant to Rules 201 and 202 of this same Chapter, development and operating permits are required when solid wastes are deposited at a site, as they were in this case. EPA v. Rafacz Landscaping and Sod Farms, Inc., PCB 72-196, 6 PCB 31 (October 24, 1972). Moreover, the "cause or allow" language of Rules 201 and 202(a) of Chapter 7 precludes the argument that the materials were brought upon Welin's property without his permission and that no permit is, therefore, needed. The Board has repeatedly held that it is

the responsibility of the landowner to insure that his land is being used properly and is not subject to nuisance dumping. EPA v. Dobbeke et al., PCB 72-130, 5 PCB 219 (August 22, 1972); EPA v. Village of Karnak, PCB 74-381, 16 PCB 13 (March 6, 1975); EPA v. Maney et al., PCB 79-262, 39 PCB 363 (August 31, 1980).

Section 21(a) of the Act reads: "No person shall...cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board." The Respondent has testified that he never permitted anyone to dump. However, the photographs and the testimony of numerous Agency witnesses clearly establish that refuse has been dumped on a massive scale which involved the use of heavy equipment. The Agency has offered no evidence that the Respondent, who travelled frequently and was usually away from the site, actively permitted open dumping or that he actually caused the dumping. However, the Board has previously held that "allow" includes inaction on the part of the landowner. The Board finds that the Respondent's passive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. EPA v. Dobbeke et al., PCB 72-130, 5 PCB 219 (August 22, 1972).

Assuming good faith on the part of Welin and total lack of knowledge about any dumping activities, he is still liable for violations of the Act. EPA v. Village of Port Byron, PCB 72-67, 6 PCB 9 (October 24, 1972); Meadowlark Farms, Inc. v. Illinois Pollution Control Board, 17 Ill.App.3d 851, 308 N.E. 2d 829, at 836 (1974); Bath, Inc. v. Illinois Pollution Control Board, 10 Ill.App.3d 507, 294 N.E.2d 778 (1973). Although the Respondent has claimed that there has been no indication of regular dumping activities at the site, the evidence indicates otherwise. The Respondent's own witness, James F. Cordray, has even admitted dumping cement, dirt, and excavating materials at the site during the time period of the Complaint (R. 405-406). Additionally, there is no question that the site did not have requisite permits, thereby violating Section 21(d) [previously Section 21(e)] of the Act.

Finally, Welin is alleged to have failed to provide a final cover at this site as required by Rules 301 and 305(c) of Chapter 7. Rule 305(c) requires a compacted layer of not less than two feet of suitable material be placed over the entire surface of each portion of the final lift within sixty days. Despite numerous warnings and requests by the Agency, as of the time of the last hearing, no final cover had been provided at the site (R. 215-216). Accordingly, the Board finds that the Agency has met its burden of proof with respect to each of the violations alleged against Welin.

This leaves two issues for the Board's consideration: the nature and extent of the pollution abatement order to be entered against Welin, and the amount, if any, of the monetary penalty to be imposed. The Respondent argues that he should not be required to provide a final cover at the site. Welin's expert

witness claims that the uncovered site poses no environmental threat, and revegetation would suffice. Therefore, Welin argues that the additional mitigating factor of cost should be considered. Welin testified that the property is currently assessed between \$2,000 and \$3,000 with a market value of approximately \$10,000 and \$12,000. The Respondent obtained verbal estimates for final cover from two parties (one being the Cordray firm). One put the cost of final cover between \$35,000 and \$40,000; the other between \$50,000 and \$60,000 (R. 431, 438-39). The Agency does not specifically allege that the materials deposited on this site constitute a hazard to the environment. The Board, however, must consider this question in light of the possible mitigating cost factor.

This low-lying site is located approximately 100 yards north of the Kishwaukee River. During high water stages it is probable that the river could have reached the site's edge (Compl. Ex. 1). Therefore, the environmental concern is the potential for overland runoff into the river, as well as leaching. To establish the existence of foundry sand at this site, three different analyses were conducted on samples taken by Agency personnel and Kunes. The first, a water leach test, was performed by Florence Lippe and Bernard Pontius, rebuttal witnesses for the Agency, on the sample taken by Wengrow in 1977 (Compl. Ex. 13B, 16, 17A and 17B). The results established that the concentrations for iron, manganese and lead exceeded effluent standards. Secondly, a pH5 leach test was conducted by Steven Muir of the Agency on a composite sample collected by Hutson from four different locations at the site (Compl. Ex. 6H, 19A, 19B and 19C). These results indicated that for seven of the parameters tested, effluent standards as contained in Part IV of the Board's Chapter 3: Water Pollution were exceeded.

Kunes conducted an Extraction Procedure (EP Toxicity) Test on the samples he had taken from the Welin site. This testing procedure was designed to identify wastes likely to leach hazardous concentrations of particular toxic constituents into groundwaters under conditions of improper management of a land-fill site. Extracts are obtained by simulating the leaching action that occurs in landfills and are analyzed to determine whether any toxic contaminants identified in the National Interim Primary Drinking Water Standards (NIPDWS) are present. If so, and the concentrations are greater than ten times that specified in the NIPDWS, the waste is considered hazardous. Using this formula, Kunes' results were negative.

The pH5 leach test values obtained by the Agency can be compared to EP Toxicity values, since the agitation time, the temperature, and the pH of the sample are the same for both procedures. However, the pH5 results must be divided by a factor of twenty since these results are initially calculated on the sample's dry weight basis, rather than from a portion of the sample which has been leached. Once done, the Agency's pH5

test results indicate that the waste sample exceeds the NIPDWS for lead. The discrepancy between the Agency's results and Kunes' could be due to the number of years between the two samplings or perhaps because Kunes failed to sufficiently agitate his sample (R. 531-32).

The Board recognizes that the EP Toxicity Test was designed to indicate the leaching potential to groundwater from an improperly managed landfill, and that this case is primarily concerned with the environmental threat posed by overland runoff. Nevertheless, these results, along with the evidence of levels exceeding effluent standards, serve as clear evidence that harmful amounts of toxic pollutants may be transported to the river by an even more direct route than leaching. The potential for leaching is also enhanced due to the configuration of the southern or riverside boundary. Therefore, despite the cost, the Respondent will be required to provide at least a two feet final cover to the site.

When considering this case, those factors contained in Section 33(c) of the Act were weighed. The site's proximity to the Kishwaukee River increases the possibility of water contamination. Due to the apparently large amount of foundry sand buried at the site, such a threat is pervasive. The erosion gullies and the one-to-one drop-off of the riverside boundary further evidence the need to contain the pollution source. The degree of injury imposed on the environment and the public's health and welfare could easily have been minimized but for the Respondent's recalcitrant disregard of the Agency's warnings. For almost five years the site has been subjected to dumping, nuisance dumping at the least, and has remained uncovered. Containing the pollution source with two feet of cover is technically practical, although economically burdensome. Therefore, in considering a penalty amount, the Board has taken into consideration Welin's cost figures. Although unsubstantiated, it is evident that he will have to spend a substantial sum to cover this site. Therefore, the Board will impose a penalty of \$500 to aid in the enforcement of the Act.

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

ORDER

1. The Respondent, Mr. Allen J. Welin, has violated Rules 201, 202(a), 301, and 305(c) of Chapter 7: Solid Waste Regulations and Section 21(a) [previously Section 21(b)] and Section 21(d) [previously Section 21(e)] of the Illinois Environmental Protection Act.
2. The Respondent shall immediately cease and desist from all further violations.

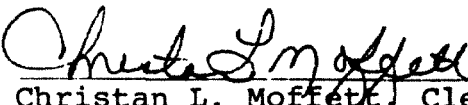
3. Within 150 days of the date of this Order, the Respondent shall:
- (a) place final cover on the site; and
 - (b) take all steps necessary to adequately police the site to prevent open dumping (including the providing of a suitable fence, entrance gate, and lock for the purpose of barring access by the public to the property, and the posting of permanent signs to deter dumping).
4. Within 45 days of the date of this Order, the Respondent shall, by certified check or money order payable to the State of Illinois, pay a penalty of \$500 which is to be sent to:

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

IT IS SO ORDERED.

Board Members J. Dumelle and N. Werner dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 13th day of May, 1982 by a vote of 3-2.



Christan L. Moffett, Clerk
Illinois Pollution Control Board