

ILLINOIS POLLUTION CONTROL BOARD
August 18, 1977

ENVIRONMENTAL PROTECTION AGENCY,)
)
 Complainant,)
)
 v.) PCB 76-57
)
)
DEAN PENN and WALTER DEEMIE,)
)
)
 Respondents.)

Mr. John Van Vranken, Assistant Attorney General, Attorney
for Complainant
Mr. Dean Penn and Mr. Walter Deemie, appeared pro se

OPINION AND ORDER OF THE BOARD (by Mr. Young):

This matter comes before the Board on the Complaint filed on March 1, 1976, by the Environmental Protection Agency charging Dean Penn and Walter Deemie with various violations of the Act and regulations in the operation of a refuse disposal site located in Peoria County. Specifically, Dean Penn is charged with owning and Walter Deemie with operating a refuse disposal site from July 27, 1974, until May 10, 1976, without the requisite operating permit in violation of Rule 202(b)(1) and Section 21(e) of the Act. Respondents are charged with failing to place cover on all exposed refuse at the end of the day's operation on seventeen different occasions in violation of Rule 305(a) and Section 21(b) of the Act. Finally, Respondents are charged with causing or allowing open burning at the site on January 8, 1976, in violation of Rule 311 and Section 21(b) of the Act.

The Board notes that Respondents are not unfamiliar with proceedings before this Board. They have been involved in one prior enforcement proceeding (PCB 72-189, 5 PCB 159) and one variance proceeding (PCB 72-432, 6 PCB 669), both of which involved this same landfill site. The final order in the enforcement proceeding, based upon a Settlement Stipulation, directed Respondents to permanently close the site no later than December 31, 1972, unless an operating permit was obtained from the Agency. When permit discussions thereafter broke down with the Agency, evidently over the question whether a clay liner should be installed to prevent leaching conditions, the Respondents filed the aforementioned variance petition which basically sought permission to continue

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operation of the site without a permit from the Agency and in the same manner as the operation had been conducted in the past. This variance request was denied because of the fears expressed regarding a continued leachate condition (6 PCB 669 670).

At the hearing held in the instant matter, Complainant attempted to establish several relevant facts through operation of Rule 314 of our Procedural Rules which requires, among other things, that the answers to request for admissions be sworn. Complainant had filed a request for admission, and although both Respondents filed answers thereto, neither was sworn as required by our rule. Because of this defect, Complainant argued the answers should be deemed as not having been filed, thus resulting in the admission of the requested facts. The Board feels otherwise. Although the answers were clearly defective, absent the filing of a Motion to Strike which would have provided the answering party a chance to remedy the defect, the Board is reluctant to, and shall not, rule that the answers be deemed as not having been filed.

In regards to the operating permit charge, the record reveals that Walter Deemie admitted that he owned (R. 31), and operated the site in question without the requisite operating permit (R. 32). These admissions are sufficient to support a finding of violation. Insofar as Dean Penn is concerned, the record establishes that he no longer owns the site in question (R. 21), nor was he the owner during the time frame of the Complaint (Ag. Exh. #27). In addition to this, there was no evidence to support a finding that he was an operator of the site. In view of the foregoing, the Board must dismiss the entire Complaint as to this Respondent.

The evidence in regards to the seventeen daily cover charges is insufficient to support a finding of violations with two exceptions. In order to prove a violation of the daily cover requirement, it is necessary to establish that such cover was not applied at the end of the working day. This fact can be established by either visiting the site at the end of the day's operation and finding that the requisite cover was not applied, or by visiting the site on two different days and finding the same refuse uncovered. EPA v. Waukegan, PCB 71-298, 3 PCB 301, 305 (1971). With the exception of the March 9, 1976, and the April 15, 1976, charges, neither the testimony nor exhibits establish that this procedure was followed. Upon inspecting Agency Exhibits 24, 25, and 26, there can be no doubt that the requisite daily cover was not applied to the refuse shown therein, and that such refuse remained uncovered for nearly two months.

In regards to the single open burning charge, the Board finds the Agency's evidence insufficient to support the finding of violation. While Agency testimony establishes that there was a

fire at the site (R. 52), the Board does not believe that a witness's mere positive response to counsel's question whether there was a fire on the site is sufficient to support a finding of violation. EPA v. C. M. Ford, PCB 72-230, 6 PCB 165, 167 (1972). Considerable amplification is necessary. Even if this testimony were to be considered sufficient to support a finding of violation, it would still be insufficient to support the imposition of any penalty for such violation. This charge will therefore be dismissed.

In consideration of Section 31(c) of the Act, the Board finds that Respondent failed to prove that compliance with the Board's regulations would have imposed an arbitrary or unreasonable hardship.

In determination of the appropriate remedy for the violations set forth herein, the Board, after consideration of the factors included in Section 33 of the Act, and the facts of this case, concludes that the technical practicability and economic reasonableness of complying with the regulations as well as the economic value of the pollution source, and the priority of location, were never raised as issues in this case. While the Board recognizes the desirability of filling up an abandoned sand pit that is located in a residential area, that fact alone does not excuse the continued, longstanding violations of our regulations and of the Act as exist in this case.

Lastly, the Board notes that although no serious environmental harm has been proven, the Board believes that a penalty is nonetheless required. If the Board were to impose substantial penalties only if serious harm has been proven, the independent significance of the permit system and our regulations is lost, and a return to the common law nuisance concepts may as well occur. The Board has consistently stated that the permit system is the cornerstone of the Act and that whenever necessary, the Board should use its penalty power as an economic incentive for compliance with the permit requirements. In view of this belief, and the longstanding violation found herein, the Board will assess a penalty of \$3,000.00 for the violation of Rule 202(b)(1) and Section 21(e) of the Act, and a penalty of \$500.00 for the violation of Rule 305(a) and Section 21(b) of the Act. The Board will further require Respondent to properly close the site or obtain a permit from the Agency.

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

ORDER

1. Respondent, Walter Deemie, is found to have operated a solid waste management site from July 27, 1974, until May 10, 1976,

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in violation of Rule 202(b)(1) of our Solid Waste Rules and Section 21(e) of the Act and shall pay a penalty of \$3,000.00 for such violations; further he is found to have violated Rule 305(a) of our Solid Waste Rules and Section 21(b) of the Act on March 9, 1976, and April 15, 1976, and shall pay a penalty of \$500.00 for these violations. Penalty payment by certified check or money order payable to the State of Illinois shall be made within 35 days of the date of this Order to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

2. Those portions of the Complaint involving the single open burning charge as well as the remainder of the daily cover charges for which violations were not found to exist are hereby dismissed.

3. The Complaint, as it concerns Respondent Dean Penn, is hereby dismissed.

4. Respondent shall apply final cover within 90 days of the adoption of this Order unless he has obtained the requisite operating permit from the Agency.

IT IS SO ORDERED.

Mr. Jacob Dumelle dissents.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 18th day of August, 1977 by a vote of 4-1.



Christan L. Moffett, Clerk
Illinois Pollution Control Board