

ILLINOIS POLLUTION CONTROL BOARD  
March 28, 1977

ENVIRONMENTAL PROTECTION AGENCY,            )  
  )  
  Complainant,            )  
  )  
  v.                            )  
  )  
  )  
CITY OF LINCOLN, a municipal                )  
corporation,                                    )  
  )  
  Respondent.                )

PCB 76-60

Mr. George W. Tinkham, Assistant Attorney General, Attorney  
for Complainant  
Mr. Warren Peters, Attorney for Respondent

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 the City of Lincoln with various permit and regulatory violations in the operation of its landfill. The Complaint was amended on April 1, 1976, and three public hearings were held with the first on May 28, 1976, and the last on June 23, 1976.

The Agency initiated various discovery procedures in this matter including a Request for Admission of Facts, Request for Genuineness of Documents, and Interrogatories. The City failed to respond to any of these discovery procedures and therefore in accordance with Procedural Rule 314(c), each of the matters of fact and the genuineness of each document of which admission was requested is deemed admitted by the City.

Because of the City's failure to respond to the interrogatories as ordered by the Hearing Officer, the Agency filed a Motion for Sanctions with the Hearing Officer asking that the City be prohibited from offering any evidence relating to issues addressed by the interrogatories, which would in any way modify admissions made by the City by operation of Rule 314(c), and further that economic value of the pollution source, the economic reasonableness and technical feasibility of coming into compliance with the Rules not be issues in this case. At the first hearing, after hearing argument by the parties, the Hearing Officer granted only that portion of the Agency's request relating to the Respondent's right to submit evidence

which would modify the admissions already made by the Agency. In the course of the following hearings, the Hearing Officer effectively reversed his ruling in this regard and reserved ruling on the Motion for the Board.

The Agency's Motion is based on the premise that a party should not be allowed to ignore discovery orders and thereby gain unfair advantage at the hearing. The Board has previously stated that it will enforce discovery orders and the Board reaffirms that position. EPA v. Truax-Traer Co., PCB 72-63, 7 PCB 131; EPA v. Fleischman Malting Co., PCB 73-193, 11 PCB 443. The Board does not believe, however, that every violation of a discovery order requires the imposition of sanctions. The unanswered interrogatories the subject of this dispute were mailed to the City on April 28th, thirty days prior to the first hearing. The discovery order was not entered until May 7th, and specified that the interrogatories were to be answered on or before May 20th. On that date, the City informed the Agency that the answers to the interrogatories could not be delivered on that date. The Motion for Sanctions was filed by the Agency on the 21st day of May, and the Hearing Officer heard argument on the 28th of May, on the first day of hearings. At the hearing, the City objected to the imposition of sanctions and offered to answer the interrogatories if given additional time and accordingly moved for a continuance. The City stated the interrogatories were not answered because they were quite voluminous and because of the City's hope that the settlement discussions contemporaneously underway would render response unnecessary. The Agency thereupon objected to any continuance on the grounds that further delay should not be tolerated.

The Board does not believe the City's failure to respond under these circumstances warrants the imposition of the severe sanctions requested by the Agency. We are not concerned here with repeated failures to answer, but with only a single occurrence. While the Board does not condone this conduct on the part of Respondent, and does not believe any party should benefit from his own failure to participate in the various discovery procedures, other more appropriate relief was available. A single continuance should have been granted and if Respondent still failed to comply, the severe sanctions requested would then seem appropriate.

The Complaint in this matter is comprised of five Counts. In Count I the City is charged with operating its solid waste management site since July 27, 1974 without an operating permit in violation of Rule 202(b)(1) and in further violation of Section 21(e) of the Act. In Count II, the City is charged with unspecified open dumping charges in violation of Section 21(b) of the Act. Because of the failure to include a specific

regulation allegedly violated, this Count will be dismissed. EPA v. John W. Helms, PCB 75-357, 20 PCB 43 (1976). In Counts III, IV and V the City is charged with failure to comply with the Board's daily, intermediate and final cover requirements on numerous specified dates in violation of Rules 305(a), (b) and (c) respectively, and in further violation of Section 21(b) of the Act.

By failing to respond to the Request for Admission of Facts, the City admitted sufficient facts upon which the Board can find both the permit and cover violations. Furthermore, the City never contested the violations at the hearings but offered testimony showing the mitigating circumstances surrounding the violations.

It was the City's contention that the cover violations were primarily due to large accumulations of landscape wastes which remained uncovered during the period alleged. The record in this matter supports the City's contention. Much of this landscape waste, an estimated 2000 tons (R. 243), existed on the site prior to July 27, 1973 (R. 61), the effective date of these regulations, and some of this material was still uncovered as late as March 1, 1976 (R. 83), the date the Complaint in this matter was filed. Although the City received numerous Agency visits and reports warning the City of these violations, the record shows that little corrective action was taken by the City until late in 1975. In September 1975, the City finally placed an order for an air curtain destructor (R. 260) and generally increased their efforts to comply by hiring independent contractors to perform some of the required work (R. 292). In January of 1976, the City began to both burn and apply cover to the landscape wastes (R. 275). The City's financial records also indicate that the increased efforts did not take place until late 1975 (Resp. Exh. No. 3). Because the City delayed over two years before doing what was required, and because no satisfactory explanation was offered for this delay (R. 295), the Board believes the imposition of a monetary penalty is necessary.

In consideration of the Section 33(c) factors in the assessment of a penalty, the Board notes that although no serious environmental harm has been proven, the failure to comply with the permit and cover requirements increases the potential for such harm. The Board notes that the Agency has repeatedly denied the City's request for an operating permit because of a leachate problem (R. 235), one of the very problems which led to the adoption of the cover requirements. The City has never appealed any of these permit denials. Although this landfill provides an important service for the people of Lincoln, such a finding does not excuse a failure to comply with this requirement of the Act and particularly since an air curtain

destructor could have been utilized for disposal throughout the entire duration of the violations. Neither the location of the site, nor the priority of location is an issue in this case. Further, the City never contested the technical feasibility or economic reasonableness of complying with the regulations. These considerations aside, the Board finds the overriding circumstance in this case is the City's failure to make any serious efforts to comply for over two years, despite repeated requests and warnings by the Agency.

In view of the foregoing, the Board will assess \$250.00 for the operating permit violation and \$500.00 for the cover violations. The Board will further order the City to cease and desist further operation of the site without the requisite permits.

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

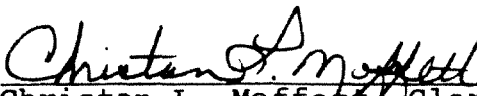
ORDER

1. IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that Respondent, City of Lincoln, is found to have operated its solid waste management site in violation of Rules 202(b)(1), 305(a), 305(b) and 305(c) of the Board's Solid Waste Rules and in further violation of Sections 21(b) and 21(e) of the Act and will be assessed \$750.00 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. Respondent, City of Lincoln, shall cease and desist further operation of its landfill unless it obtains an operating permit within 120 days of the date of this Order.

3. Count II of the Complaint is hereby dismissed.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 28<sup>th</sup> day of March, 1977 by a vote of 5-0.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board