

ILLINOIS POLLUTION CONTROL BOARD  
March 26, 1975

ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 74-473  
 )  
 E & E HAULING, INC., an Illinois )  
 corporation )  
 )  
 Respondent )

Mr. Stephen Z. Weiss, Assistant Attorney General, appeared for the Complainant.

Mr. Henry M. Schaffer, Attorney, appeared for the Respondent.

OPINION & ORDER of the Board (by Mr. Zeitlin)

The Complaint in this matter, filed by the Attorney General for the Environmental Protection Agency (Agency) on December 17, 1974, alleges violations of Rule 202(b)(1) of Chapter 7: Solid Waste Rules and Regulations of the Pollution Control Board (Board) and of Section 21(b) of the Illinois Environmental Protection Act (Act).

We must note at the start of our discussion of this matter that the Agency's Complaint is partially invalid. The Agency alleged and directed its proof at hearing to the fact that E & E operated a landfill site without a permit. Section 21(b) of the Act, however, prohibits open dumping in violation of Board regulations. There has been no allegation, either in pleadings or testimony, that any of Respondent's activities constituted open dumping, as defined in Section 3(h) of the Act. The Board cannot find any violation of Section 21(b), in that no proof regarding any violation of that Section was offered, nor does any language in the pleadings concern the question of open dumping. We therefore conclude that those portions of the Complaint concerning a violation of Section 21(b) of the Act must be dismissed.

The Board, in determining violations of the Act or of its own Regulations, cannot amend a complaint to conform with the intentions of the parties. For that reason, we cannot reach a finding of violation as to Section 21(e) of the Act, which does concern the permit requirement. "To be found in violation, a party must be properly charged and given notice of what he must defend against." E.P.A. v. Village of Winnetka, PCB 73-404, Nov. 22, 1974, opinion at 3; see also, Fry Roofing Co. v. Pollution Control Board, 20 Ill. App. 3d 301, 314 N.E. 2d 350, 354 (1974).

The presentation of facts constituting a violation of Section 21(e) of the Act cannot cure this basic due process defect.<sup>7</sup> Nor, it should be noted, did the Agency avail itself of the benefits of Board Procedural Rule 328, which here would have allowed a conformance of the pleadings to the proof offered at hearing.

Turning then to the remaining charge, regarding violation of Rule 202(b)(1), Respondent E & E Hauling, Inc. (E&E), is alleged to have operated a solid waste management site in DuPage County without the required operating permit from the Agency during the period from July 27, 1974 until December 17, 1974, on which date the Complaint in this matter was filed. At a hearing held in the matter on February 7, 1975 the parties entered a Stipulation of Facts which forms much of the basis of this Opinion. Although no witnesses were heard at that hearing, statements were entered by the Attorneys for E & E and the Agency regarding the circumstances surrounding the facts which had been stipulated to. By the nature of these facts, the statements and circumstances must be seen as arguments regarding factors of mitigation or aggravation in this matter.

The parties have stipulated that Respondent has operated the subject solid waste management site in DuPage County since June, 1970. The site is currently operating and will continue to do so until about March 15, 1975. In an amendment to the stipulation received by the Board on March 10, 1975 the parties have stipulated that E & E will cease accepting refuse at the site by March 15, 1975, although final cover and seeding may not be completed until July 31, 1975. E & E has been accepting approximately 8,000 yards of domestic refuse and building material daily on a five-day work-week basis, as a part of its operations on the site.

Commencing on October 15, 1973, and continuing through September 5, 1974, E & E received a series of nine letters from the Agency indicating that a permit would be required for the site in question subsequent to July 27, 1974. E & E responded to two of the letters in October, 1973 and May, 1974, indicating its intent to cease operation on the site before July 27, 1974. In response to the E & E letters, the Agency confirmed E & E's understanding of the date after which a permit would be required. All of the communications were attached as exhibits to the Stipulation, and indicate clearly that the parties understood the requirement that E & E have an operating permit after July 27, 1974.

On July 26, 1974, E & E submitted an application for an operating permit to the Agency. That application was denied on August 22, 1974 for lack of adequate information.

After replacing its consulting engineers, E & E on December 11 and 19, 1974 filed with the Agency additional information regarding its permit application. E & E's re-application for an operating permit has not yet been acted upon by the Agency.

The parties also stipulated to testimony which would have been offered by a Mr. Kenneth Bechely, an Agency Surveillance Associate assigned to inspect E & E's site. Mr. Bechely's stipulated testimony covered three points:

1. Mr. Bechely inspected E & E's site on four occasions subsequent to July 27, 1974, and noted on each occasion that refuse was being accepted at the site. (One of the dates, however was subsequent to the filing of the Complaint in this matter and is not germane to the resolution of whether E & E was in fact operating without a Permit.)

2. The operational permit system employed by the Agency is necessary to determine whether solid waste disposal sites are environmentally sound. The information contained in a complete permit application discloses what, if any, effect the operation of a site may have on ground or surface waters. Such information is necessary to assure that a site, and operations on it, are environmentally sound.

3. The information accompanying E & E's July 26, 1974 application was insufficient to allow the Agency to determine whether or not that site was environmentally sound. Regardless of whether a site may be operated in general compliance with the Board's Solid Waste Regulations, such operation is not determinative of whether there are conditions present which could yield actual water pollution.

Mr. Bechely also took photographs of the E & E site on September 6, 1974, and said photographs were attached to the Stipulation as an exhibit.

It is clear from the facts stipulated to that Respondent E & E did operate a solid waste management site during the period alleged, and that it did so without an operating permit from the Agency. Further, E & E has not seriously contended that it was justified in such operation without a permit. E & E has stated that it felt, until July, 1974, that it would be able to close the site in question prior to the period for which violations are alleged here. The Board agrees with the Agency that Respondent's misconception as to the time of cessation of its own activities is insufficient to justify non-compliance with the Act and the Regulations. While E & E may have relied on a consulting engineer in preparing its first application, which engineer E & E later discharged, such reliance does not constitute sufficient grounds to excuse compliance with the applicable regulations. All the factors leading to E & E's operation without the required permit were within the control of E & E. A finding of violation is mandatory.

In mitigation, it does not appear that E & E's eleventh-hour permit application, submitted one day before an operating permit was required, was a deliberate attempt to avoid an obligation under Rule 202(b)(1). Further, the Agency inspection reports, appended as exhibits to the Stipulation, indicate that the E & E site was operated largely in accord with other applicable Board Regulations. For that reason, it is the finding of the Board that a penalty of \$2,000 will act as a sufficient deterrent in similar matters.

Implicit in our finding here is a reaffirmation of the Board's commitment to the permit process which it instituted as a part of the Solid Waste Regulations. The Board agrees with the Agency that to protect the environment, a viable, enforced permit system is necessary for the orderly regulation of solid waste management sites. Where the necessary permit has not been acquired as a result of factors wholly within the control of the individual required to have such permit, a finding of violation and the imposition of a penalty are both appropriate. It is fully reasonable and practical for the Board to require such permits to protect the public interest against the possibility of environmental harm. Weighing these and the other factors set out in Section 33(c) of the Act, we find Respondent's operation without the required permit unjustified under the circumstances.

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

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Respondent E & E Hauling, Inc., is found to have operated a solid waste management site in DuPage County, without the required operating permit from the Agency, in violation of Rule 202(b)(1) of Chapter 7: Solid Waste Rules and Regulations, during the period July 27, 1974, to December 17, 1974.

2. Respondent E & E Hauling, Inc., shall pay as a penalty the sum of \$2,000, payment to be made within 35 days of the date of this Order, by certified check or money order to:

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

3. Respondent E & E Hauling, Inc., shall cease and desist all refuse disposal activities, and shall promptly initiate efforts to properly close and apply final cover to the site in accordance with applicable Board Regulations, unless the proper operating permit shall have been received within 60 days of the date of this Order.

4. That portion of the Complaint in this matter alleging violation of Section 21(b) of the Environmental Protection Act is dismissed.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion & Order were adopted on the 26th day of March, 1975 by a vote of 4 to 0.

Christan L. Moffett (gn)  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board