



to strike these supplementary dates was filed on April 11, 1973. The Hearing was held on April 13, 1973, and completed on June 20, 1973. Respondent was represented by counsel, Mr. Gard.

At the Hearing the Respondent admitted that he owned the site and had been dumping refuse there for three years (R-240, 248) and only received a permit on June 13, 1973 (R-254). He acknowledged that during the time that he had been dumping refuse into "Mud Lake" the shape of the lake had been changed (R-244). He admitted that the dumping has been carried on without on-site supervision (R-309) and that refuse had sometimes not been compacted on a daily basis (R-312). Furthermore, when cover was applied, it was not always done according to the specifications demanded under the Rules and Regulations (R-358). Respondent also admitted having received notice from the State of Illinois or its agencies that he was violating the law, but he added that the EPA had never told him to stop (R-253).

The unrefuted evidence presented by the Complainant showed that on September 17, 1970, refuse was in the water along the eastern face of the dump (R-177, 178). On April 22, 1971, refuse was found lying in "Mud Lake" along the 400-foot face of the dump. No cover material was observed near the face where the refuse was in the water (R-73). On July 20 and July 29, 1971, another inspection was made of the dump. No supervision was seen on either day (R-101). The uncontradicted evidence further showed that a truck bearing the name of "Frietsch" was seen dumping at the site on July 29, 1971. Photographs were taken on these two days (Complainant's Group Exhibit 8). The photographs show refuse in "Mud Lake". A comparison of these photographs also shows that spreading, compacting, and covering of this refuse did not occur between the July 20 and July 29 interval. Next, the evidence showed that on August 30 and August 31, 1971, refuse was in the water along the 400-foot face of the dump (R-52-26). This evidence was not challenged. No cover material was applied to the refuse existing proximate to "Mud Lake". The photographs taken on these two dates (Complainant's Group Exhibit 3) point out that spreading, compacting, and covering did not occur during the evening of August 30, 1971. The September 28, 1971, inspection revealed that no cover had been applied to much of the face last observed as uncovered on July 29, 1971 (R-114). The face was observed to have extended farther eastward into "Mud Lake", and refuse was still lying in the water in the same manner in which it had existed on previous visits (R-115). Photographic evidence was introduced (Complainant's Group Exhibit 13) for January 27 and 28, 1972. The photographs established that refuse, uncovered, was lying in the water. This existed along the entire length of the face (R-123). No cover had been applied since the previous visit of January 31,

1972 (R-123). Photographs (Complainant's Group Exhibit 16) entered into evidence for April 17, 1972, show refuse lying in the water. Dumping was also seen on this date (R-188). Photographs (Complainant's Group Exhibit 17) taken June 2, 1972, show trucks bearing the name of "Frietsch" dumping refuse at the site. Actual dumping was observed on November 27 and November 28, 1972 (R-202, 203). Photographs taken on November 27 (Complainant's Group Exhibit 20) show refuse lying uncovered in the water, along the face of "Mud Lake". The material is uncovered and uncompacted, as observed on previous occasions. Testimony was also introduced that the Respondent permitted scavenging on the premises (R-301).

Respondent's defense focused primarily on the fact that the continued filling of "Mud Lake" would be beneficial to the community (R-284, 341, 353).

We conclude that the Respondent violated Sections 21(b), (e) and (f) of the Act and Rules 5.04, 5.06, 5.07, and 5.12(a) and (c) of the Rules and Regulations.

First, although the Rules and Regulations violated in this Complaint have now been superceded by Chapter Seven: Solid Waste Regulations of the Pollution Control Board, Respondent's libability is to be adjudged under the rules in effect at the time of the violation. Rule 102 of Chapter Seven makes clear that any proceeding which arises prior to the effective implementation date of Chapter Seven is to be governed by the Rules and Regulations. The implementation date of the Rules under Chapter Seven is July 27, 1973. All violations under this Complaint occurred prior to this date.

Second, Respondent objected to EPA's amending the Complaint by the addition of ten more violation dates on April 5, 1973, eight days before the Hearing was actually held. Essentially, Respondent's argument is that the filing of the amended Complaint does not comport with the due process standard of fairness, which demands that a party be given sufficient notice to prepare a defense. Under Procedural Rule 327, a continuance can be granted to avoid undue surprise. The Hearing Officer offered to grant the Respondent a continuance as to the additional dates if he wanted one (R-7). The Respondent stated that he did not need a continuance but was in fact ready to defend on those dates (R-7). We therefore rule that the Respondent waived any due process objection as to those dates presented in the amended complaint of April 5, 1973.

Third, we believe that Respondent did not violate Rule 5.05. Rule 5.05 is violated when evidence establishes that insufficient equipment is at the site to permit operation of the

site according to the approved plan. Lack of an approved plan does not violate this Rule; rather, this Rule is violated when the equipment does not measure up to the approved plan. Since no approved plan existed, we feel it was incumbent upon the EPA to submit evidence to establish the usual equipment requirements for a landfill of this type and size. The result of its failure to do this means that the Board has no yardstick by which to determine whether the equipment at the site was adequate. For these reasons, we conclude that the EPA has not established that Rule 5.05 has been violated.

Fourth, open dumping is a catchall term that embraces a number of specific infractions alleged elsewhere in the complaint. In light of our findings on these more specific counts, we find it unnecessary to decide whether Section 3.04 of the Rules and Regulations has been violated here. See EPA vs. Clay Products Co. #71-41, 2 PCB 33 (June 23, 1971).

In assessing a penalty in this case, the Board focuses particularly on four factors. First, the Respondent knowingly violated the law over a protracted period of time. Respondent's knowledge antedated by eighteen months certain violations established under the Act and Rules and Regulations. There is no evidence in the record to show compliance with the Act and Rules and Regulations by the time of the April 13th hearing. On the contrary, a statement made by Mr. Frietsch that "They told me it was wrong but they didn't tell me to stop" shows a narrow and myopic understanding of his duties under the law. This conscious disregard for the law is an important factor in assessing a penalty. See EPA vs. Quincy Park District #72-99; 5 PCB 213, 214 (August 22, 1972). Second, operating without a permit is a serious violation of the Act. Section 21(e) makes a permit mandatory. An individual who operates without a permit penalizes those who do comply with the Act as well as those who make good faith efforts to follow the law. Third, the amount of impact on the environment can soften or aggravate the penalty. The amount of harm done is not to be correlated with the penalty, because the behavior proscribed under the Act is not contingent upon the damage caused the environment. In this case, minimal environmental impact was shown and this calls for some mitigation. See Freeman Coal Company vs. EPA #71-78, 2 PCB 709, 711 (October 28, 1971). Fourth, failure to get a permit and to carry out the other provisions of the Act and Rules and Regulations should not dedound to the economic benefit of the Respondent. To not consider the advantage that the offender has gained through avoidance of the law would allow the Respondent to profit by his own wrongdoing. Expenses saved, the volume of dumping and its duration, and the overall economic viability of the Respondent must be considered in assessing a penalty.

This opinion constitutes the findings of fact and conclusions of law of the Board.

ORDER

It is the Order of the Pollution Control Board that:

(1) Respondent cease and desist from violating those provisions of the Act and Rules and Regulations as established under this Opinion.

(2) Respondent file a compliance program with the EPA within 90 days of the adoption of this Order. If Respondent cannot complete his program of compliance by July 1, 1974, he should file a petition for variance with the Agency under Section 37 of the Act at the appropriate time.

(3) Respondent shall pay a penalty of \$2,500 for the violations of the Act and Rules and Regulations as described in this Opinion. Payment shall be by certified check or money order made payable to the State of Illinois, Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706. Payment shall be tendered within 90 days of the adoption of this Order.

I, Christan L. Moffet, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27<sup>th</sup> day of November, 1973, by a vote of 5 to 0.

Christan L. Moffet