

ILLINOIS POLLUTION CONTROL BOARD
February 14, 1973

ENVIRONMENTAL PROTECTION AGENCY)
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 v.) #72-268
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 LEHMKUHL CONSTRUCTION COMPANY, INC.)

Thomas A. Cengel, Assistant Attorney General, on behalf of
Environmental Protection Agency

Edward Maag and Harry Sterling on behalf of Respondent

Opinion and Order of the Board (by Mr. Lawton):

By complaint filed on June 28, 1972 and amended on July 31, 1972 and September 28, 1972, Lehmkuhl Construction Company, Inc. ("Respondent"), owner and operator of certain landfill facilities located at the rear of 300 Front Street in East St. Louis, Illinois, was charged with numerous violations of the Environmental Protection Act (Ill. Rev. Stat. 1969, Ch. 111 1/2), hereinafter called the "Act" and the Rules and Regulations for Refuse Disposal Sites and Facilities, hereinafter called the "Refuse Rules." Specifically, Respondent is charged with causing or allowing the open dumping of refuse in violation of §21(b) of the Act and Rule 3.04 of the Refuse Rules on twenty separate dates from September 24, 1971 through August 21, 1972; failure to properly spread and compact refuse in violation of Rule 5.06 of the Refuse Rules on April 4 and 5, May 4 and August 21, 1972; failure to provide proper daily cover in violation of Rule 5.07(a) of the Refuse Rules on the same twenty dates of the alleged open dumping offenses; and failing to prohibit the deposition of refuse in standing water in violation of Rule 5.12(c) of the Refuse Rules on twelve separate dates from January 25, 1972 through August 21, 1972. An additional date of alleged infraction of Rule 5.12(c), July 3, 1972, had been added to the five dates originally listed in the complaint by amendment, but the second amended complaint, filed on September 28, 1972, omitted said date. We, therefore will not consider any evidence relating to an alleged Rule 5.12(c) infraction on July 3, 1972.

In addition to all of the above alleged violations, Respondent stands charged with operating the site since December 20, 1971 in violation of special condition #3, relating to having available at the site adequate materials to apply proper daily and final cover, and special conditions #6 and 7, relating to properly

spreading and compacting refuse as well as to the application of proper cover, of its Permit, #1971-52 (Comp. Ex. 3).

A public hearing on the charges was held in the East St. Louis City Hall on December 29, 1972. The evidence introduced at the hearing did indeed prove that serious violations of the Act and Refuse Rules had occurred on several occasions and revealed that the site had been operated in a manner bordering on flagrant malfeasance for several years:

1. Open Dumping of Refuse: Agency witnesses testified that they observed refuse, consisting primarily of demolition materials, wood, bricks, concrete and paper products, being openly dumped at the site on Sept. 24, 1971 (R. 22); Sept. 30, 1971 (R. 28); Oct. 21, 1971 (R. 30); Oct. 29, 1971 (R. 36, Comp. Ex. #4); Dec. 2, 1971 (R. 44-46); Dec. 20, 1971 (R. 40-41); Jan. 10 and 25, 1972 (R. 48-52); Feb. 10, 1972 (R. 72, Comp. Ex. 5(a) - (1)); Feb. 15, 1972 (R. 72-73, Comp. Ex. 5(a) - (1)); Feb. 25, March 7 and March 10, 1972 (R. 72-73); April 4 and 5, 1972 (R. 82-86, Comp. Ex. 8(a) - (1)); May 4 and 16, July 3 and 13 and Aug. 21, 1972 (R. 72-73). They further testified that the refuse being dumped was not being covered, but was being pushed over the face of a steep bank, into a large hole, or merely over a rise by a Caterpillar bulldozer. On virtually every visit, Agency representatives spoke with officials at the site and advised them of the apparent violations, and they were either assured that cover material had been ordered and would arrive shortly (R. 41); or that they were operating under oral permission from "Springfield" (R. 20-30); or that operation pursuant to the requirements of the Refuse Rules would be too difficult (R. 46, 76).

While we are somewhat distressed over the relatively short length of time spent by the Inspectors at the site during each of their visits, we feel that some of the evidence overwhelmingly indicates that materials had been dumped at the site and left uncovered for many days. Specifically, Comp. Ex. 5 consists of fifteen photographs taken from virtually the same locations five days apart: Exhibits 5(a), (c), (e), (g), (i) and (k) were taken on February 10, 1972, and Exhibits 5(b), (d), (f), (h), (j), (l), (m), (n) and (o) were taken on February 15. These photographs vividly depict vast mounds of unspread, uncompact and uncovered refuse in the identical condition some five days apart, and, combined with the testimony referred to above, are sufficient to prove violations on these two dates. Similarly, testimony that refuse was observed being dumped and then pushed by a Caterpillar over a steep fill face without being covered on April 4 and 5, 1972 (R. 82-86) combined with Comp. Ex. 8(a) through (l) amply prove the alleged violations on these dates as well.

It is very possible that Respondent openly dumped refuse on the other sixteen dates alleged in the second amended complaint. But for us to hold that such violations actually occurred in the absence of testimony that exposed refuse observed one day was observed in the same state on another day would be unfair. Similarly, to show that Respondent has failed to apply proper daily or final cover would require more than a fifteen minute spot visit by an investigator with no follow-up or verification at the end of the day, on the next day, or at some later date.

2. Failure to Properly Spread and Compact Refuse: Violations were shown to have occurred on April 4 and 5, 1972 (R. 82-86, Comp. Ex. 8); similar offenses were alleged to have occurred on May 4 and Aug. 21, 1972, but apart from rather scanty testimony that cover material was not observed being applied on these dates (during the visit of the Inspectors), no further proof was offered. That is hardly enough evidence to convince the Board that proper cover had not been applied by the end of the day in question, or indeed within a few minutes after the Inspectors had departed.

3. Failure to Apply Proper Daily Cover: Respondent is charged with having failed to apply proper daily cover on the same twenty dates of alleged open dumping offenses. For the same reasons noted in numbered paragraph (1.) above, we find such violations were proven to have occurred on February 10 and 15, 1972 (R. 72-73, Comp. Ex. 5) and on April 4 and 5, 1972 (R. 82-86, Comp. Ex. 8).

4. Failing to Prohibit the Deposition of Refuse in Standing Water: Violations were proven to have occurred on Jan. 25, 1972 (R. 52-53); February 10, 15 & 25, 1972 (R. 73, Comp. Ex. 5); March 7 and 10, April 4, May 16, July 13 and August 21, 1972 (R. 73). Comp. Ex. 8(i) and (j) graphically depict the refuse deposited in standing water on April 4, but no similar evidence was offered for the other dates of alleged offenses.

5. Permit Violations: Based upon the evidence cited above, we find that Respondent had violated special conditions 3, 6 and 7 of its permit.

In summary, we find that the evidence proves that Respondent has violated the applicable laws and regulations with regard to the open dumping of refuse on four occasions, failing to properly spread and compact refuse on two occasions, failing to apply proper daily cover on four occasions, failing to prohibit the deposition of refuse in standing water on ten occasions, and with having violated provisions of its permit to operate the site.

Mr. Lehmkuhl, it appears, cannot be found and did not attend the hearing. Counsel for Respondent made clear that Respondent does not feel responsible for Mr. Lehmkuhl's behavior, especially

with regard to the allegations that he had offered an Agency Inspector one hundred dollars on two separate occasions (R. 50, 54; Hearing Officer Ex. 1 and 2). The principal thrust of Respondent's defense would appear to be based upon an improper search and seizure argument, since Agency inspectors entered Respondent's property uninvited and without a search warrant. This argument is plainly wrong.

Sections 4(c) and (d) of the Act (Ill. Rev. Stat. 1969, Ch. 111-1/2, §1004(c), (d)) read as follows:

- (c) The Agency shall have the authority to conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential contaminant or noise sources, of public water supplies, and of refuse disposal sites.
- (d) The Agency shall have the authority to enter at all reasonable times upon any private or public property for the purpose of inspecting and investigating to ascertain possible violations of the Act or of regulations thereunder, in accordance with constitutional limitations.

Furthermore, paragraph three of the standard conditions attached to Respondent's own permit, states:

During or after the construction or the installation of refuse disposal site or facility for which a permit has been issued, any agent duly authorized by the Environmental Protection Agency shall have the right and authority to inspect such work and operation.

There is no indication that Agency personnel violated any constitutional limitations in their inspection of Respondent's operation or that they violated any of Respondent's constitutional rights. Furthermore, Respondent's operation, under the permit granted by the Environmental Protection Agency, conveys explicit authority to the Agency to conduct precisely the type of inspection of which Respondent complains. Inspection pursuant to such previously granted consent cannot be deemed in contravention of any constitutional guarantee.

The Agency introduced testimony relating to the condition of the site on ten separate occasions subsequent to August 21, 1972, the last date of alleged violation appearing in the second amended complaint. Counsel for the Agency said these dates, from October 4, 1972 through December 28, 1972 (the day before the hearing) related to Complainant's allegations of violations "continuing through the close of the record in this case." As we have held in the past, we will no longer tolerate such omnibus pleading or the introduction of proof of violations allegedly occurring after the complaint has been filed (and, as here, amended on several occasions) unless proper notice has been given, and Respondent has been afforded fair and adequate opportunity to meet the charges against him (EPA v. Mystik Tape, a Division of Borden, Inc., #72-180, (January 16, 1973); EPA v.

George Rosenbalm, d/b/a Mount Morris Sanitation Service, #71-299, January 16, 1973). Accordingly, we will not consider evidence of violations allegedly having occurred on those dates.

In addition to the numerous violations proven to have occurred at this site, the overall picture presented is that of an extremely sloppily-run operation. Respondent appears to have disregarded and ignored applicable rules and regulations, and even its own permit, in the operation of this facility, either due to ignorance of the requirements therein or to a deliberate decision not to comply. There is no way for us to know which of the above conclusions is correct since Mr. Lehmkuhl has not appeared and Mr. Roberts and Mr. Vaughn both refused to testify at the hearing. We are disappointed by their uncooperative attitude but feel that the record is more than adequate to enable us to reach a fair determination of the issues even without their participation.

At the end of the hearing on this matter, counsel for respondent stated that "... (we) are going to cease and desist and terminate the complete operation and ask for instructions on how to wind this thing up and finish it." As part of its Order in an enforcement action, the Board is specifically authorized by Section 33(b) of the Act to revoke a permit as a penalty for violations found to have occurred (Ill. Rev. Stat., 1969, Chap. 111-1/2, §1033(b)). Accordingly, we will order the revocation of the permit previously issued for the operation of this site.

In addition, for the many serious and flagrant violations found herein, we will assess a monetary penalty in the amount of \$5,000 and will order Respondent to submit within fifteen days a plan for the final covering, closing and fencing of this site, and to have fully accomplished such termination of operations within thirty days of the date of receipt of this order. A substantially higher money penalty could easily have been justified, especially in view of the many repeatedly ignored warnings given to Respondent's representatives about the condition of the site; it is extremely unlikely that we will look so kindly upon such severe violations of the law relating to refuse disposal sites in the future.

The above constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Permit #1971-52 granted to Lehmkuhl Construction Company, Inc., Dupon, Illinois, on November 30, 1971 to install and operate a solid waste disposal site at the rear of 300 Front Street, East St. Louis, Illinois, is hereby revoked.
2. Respondent shall pay to the State of Illinois, within thirty-five (35) days of the date of receipt of this Order, the sum of \$5,000.00 for the violations found in this proceeding. Payment shall be made by check or money order payable to the State of Illinois, and shall be sent to "Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706."
3. Respondent shall forthwith cease and desist all violations of the Act and Refuse Rules at said site and shall not cause or allow such violations to recur in the future.
4. Respondent shall submit to the Board and the Agency within twenty (20) days of receipt of this Order, a comprehensive plan detailing how the site shall be entirely covered, completely closed and fenced in within sixty (60) days of receipt of this Order.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 14th day of February, 1973, by a vote of 3-0.

Christan S. Moffett