

ILLINOIS POLLUTION CONTROL BOARD  
May 20, 1976

ENVIRONMENTAL PROTECTION AGENCY, )  
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 Complainant, )  
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 v. ) PCB 75-406  
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 )  
 RICHARD C. MCCORMICK, )  
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 )  
 Respondent. )

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

On October 17, 1975, the Environmental Protection Agency (Agency) filed before the Board a Complaint against Respondent Richard C. McCormick, alleging a violation of Rule 305(c) of the Board's Solid Waste Regulations and hence Section 21(b) of the Environmental Protection Act (Act). On November 5, 1975 the Agency filed and sent to the Respondent a Request for Admission of Facts, to which Respondent did not respond (R. 50). On January 2, 1976, the Agency filed and sent to the Respondent a notice to appear at the scheduled hearing and produce documents relating to the economic reasonableness of compliance with the Board's Regulations and the Act. On January 14, 1976, a hearing was held on this matter in the Marshall County Courthouse, Lacon, Illinois. Respondent failed to appear at this hearing and no documents were produced (R. 51); nor did any representative or attorney of Respondent appear (R. 21).

The Hearing Officer in this matter, Mr. Jeffrey J. Estes states:

I want the record to show that I have called the Respondent, Richard C. McCormick at all the public areas of this Courthouse in Lacon, Illinois, and, for that matter, in the Circuit Court Room, and he has not responded. He has been duly notified of this hearing in the manner prescribed by statutes and the procedural rules (R. 3).

I would like to note here, before I forget it, that this hearing was commenced at 10:30 this morning.

It was set for 10:00 and we waited for thirty minutes. It is now several hours since the hearing was scheduled to start and Mr. McCormick has not appeared yet (R. 48).

Rule 320 of the Board's Procedural Rules provides: "Failure of a party to appear on the date set for hearing, or failure to proceed as ordered by the Board, shall constitute a default. The Board shall thereafter enter such order as appropriate based upon the evidence introduced at the hearing." The Board must therefore now consider the record established by the Admissions under Rule 314 and the evidence presented by the Agency at the January 14, 1976 hearing.

Pursuant to Rule 314(c) of the Procedural Rules, each of the matters of fact of which admission was requested are hereby deemed admitted. Further admitted are the genuineness and accuracy of each document for which admission was requested. The following facts are thus established:

1. Respondent formerly operated a solid waste site southeast of Magnolia in Marshall County.
2. Respondent ceased operations of the site on or about August 5, 1974.
3. Respondent did not, as of October 7, 1975, provide the final cover required by Rule 305(c) of the Solid Waste Regulations.

On the basis of these "admissions" the Board finds Respondent in violation of Rule 305(c) of the Solid Waste Regulations and Section 21(b) of the Act as alleged in the Complaint. Further, the same finding is fully supported by the Agency's evidence presented at the hearing.

The Board must next determine the appropriate remedy. Section 33(c) of the Act requires that the Board take into consideration all of the facts and circumstances bearing upon the reasonableness of the violations. However, the question presented is what happens when the record is silent on any of those factors.

Section 31(c) of the Act places the burden of proof of the 33(c) factors upon the Respondent to show mitigation where, as in this case, the alleged violation involves one of the Board's Regulations. By failing to produce the requested documents and by failing to appear at the hearing, Respondent has

failed in that burden and has thus waived his right to have "...all the facts and circumstances bearing upon the reasonableness..." considered under Section 33(c) of the Act.

At the hearing the Agency stated that its estimate of the cost of covering the site would be \$40,000 (R. 14). This estimate was based on the determination that 43,000 cubic yards of dirt would be required (R. 15) and that there is sufficient dirt available at the site location (R. 14, 39). As Respondent operates a landfill site north of Minok, Illinois (R. 16), he already has the necessary equipment and men employed on his payroll (R. 25). This could considerably lessen the cost of applying the final cover (R. 15).

The Board will order Respondent to cease and desist this violation of the Act. To accomplish this, Respondent must properly close and cover the site, including grading to provide drainage and seeding to prevent erosion, within ninety days of the date of this Order.

It is admitted that Respondent ceased operation of the site on or about August 5, 1974 (see above). Further, Exhibit 20 is the lease and agreement by which Respondent was allowed to operate the site (R. 31). The lease expired over a year ago. Therefore, the cease and desist order requires the Respondent to comply with Rule 305(c) of the Solid Waste Regulations; to properly apply a final cover.

The Respondent's default and the fact that he had been previously requested to apply a final cover (Exhibit 16, 17) indicate a definite lack of good faith. The Board further takes notice of a prior Board Order (PCB 72-16) referenced in the record (R. 17). In that enforcement action the Board found this same Respondent to have violated regulations in his daily operation of this same landfill site, assessed a penalty of \$250.00, and ordered Respondent to cease and desist the violations at this site. Further, Exhibit 24 is a Judgment against Respondent, entered in the Circuit Court for the Tenth Judicial Circuit (No. 74-E-126), ordering him to remit \$250.00 to the State of Illinois at the Environmental Protection Agency. This Order was sought and obtained by the Attorney General of Illinois to recover the penalty assessed against Respondent in PCB 72-16 which he had failed to pay (R. 18). These facts clearly establish a course of conduct demonstrating bad faith.

The Board therefore finds that a performance bond in the amount of \$40,000 is necessary to insure compliance with this Order.

The Board further finds a substantial penalty to be appropriate in this cause. In making this determination the Board has considered the evidence presented by the Agency relative to the factors as described in Section 33(c) of the Act. While finding that Respondent has waived its right to have mitigating factors considered, the Board will, in fashioning this remedy consider that evidence pertaining to 33(c) factors which does appear in the record.

33(c)(1) The main purpose of this final cover requirement is to prevent leaching (R. 13). Leachate has such adverse effects as de-oxygenating and/or contaminating ground water and wells with materials toxic to humans as well as other wildlife (R. 14). Mr. William Child, Regional Supervisor of the Agency's Division of Land Pollution Control, Central Region, testified that he has observed leachate coming from Respondent's site. The leachate enters a small intermittent stream which probably flows into Bud Creek (R. 23, 24). The problem of leachate is amplified by the fact that the site is located in a headwater area (R. 23). Exhibit 4 describes the nature of the observed leachate problem. While there is no documentation of specific adverse environmental effects, it appears that they would exist. Such contamination of groundwater, streams and wells is not only unnecessary but the damage to our environment is difficult to measure.

33(c)(2) A closed landfill has no positive social or economic value except for new uses of the land. An improperly covered landfill has a highly negative social and economic value. When operated, this site apparently did have social value as a place to dispose of domestic waste. However, improper operating practices such as the violations found in PCB 72-16 negate any such value where an alternate disposal site probably exists. Further, Respondent has a minimal investment in the site (R. 31, Exhibit 20).

33(c)(3) Respondent's site consists of six acres of gravel pits (R. 45). An intermittent stream runs through this headwater area (R. 23). Aside from these factors, which demonstrate that the site is unsuitable for a landfill, there are only five residences shown to be in the immediate

vicinity of the site (Exhibit 1, R. 28). Each of these people apparently has an interest in the land on which the landfill was operated and were parties to the lease which allowed Respondent to fill the gravel pits (R. 27 to 29, Exhibit 20).

33(c)(4) There is no doubt that the application of final cover to a landfill is both technologically practicable and economically reasonable. On the evidence before the Board, it is obvious that Respondent's operation of this site was not a matter of extreme expense. The payment of \$15 or \$20 monthly rent on an operating landfill was not a hardship to the operator (R. 32). Further, as discussed above, Respondent already has the necessary equipment and manpower, and the cover material is at the site.

Consideration of these factors leads to the conclusion that a substantial penalty is appropriate. It is not enough merely to order a violator to do that which he was required to do in the first place. A substantial penalty is necessary here to aid enforcement of the Act. Respondent has created a danger of contaminating rivers, groundwaters and wells, and all apparently because compliance with the law would cost money. The purpose of the Act is, "...to assure that adverse effects upon the environment are fully considered and borne by those who cause them" (Section 2-b). The Board will require that Respondent pay a civil penalty of \$5,000.

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

#### ORDER

1. Respondent Richard C. McCormick is hereby found to have violated Rule 305(c) of the Board's Solid Waste Regulations and Section 21(b) of the Act.
2. Respondent Richard C. McCormick shall cease and desist the aforesaid violation and shall properly close and cover the subject site, including grading to provide drainage and seeding to prevent erosion, within 90 days of the date of this Order. A final closing plan shall be presented to the Illinois Environmental Protection Agency within 30 days of the date of this Order.

3. Respondent Richard C. McCormick shall pay a penalty for for the aforesaid violation the sum of \$5,000 to the State of Illinois, payable by certified check or money order within 35 days of the date of this Order to:

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

4. Respondent Richard C. McCormick shall post a performance bond, in a form satisfactory to the Agency, in the amount of \$40,000 to guarantee compliance with paragraph 2 of this Order. The bond shall be posted, within 10 days of the date of this Order, with:

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

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 20<sup>th</sup> day of May, 1976 by a vote of 5-0.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board