

ILLINOIS POLLUTION CONTROL BOARD
November 10, 1977

ENVIRONMENTAL PROTECTION AGENCY,)
)
 Complainant,)
)
 v.) PCB 76-114
)
 HAROLD BROVERMAN and THEODORA)
 BAKER, d/b/a TAYLORVILLE LANDFILL,)
)
 Respondents.)

OPINION AND ORDER OF THE BOARD (by Dr. Satchell):

This matter comes before the Board upon a complaint filed April 26, 1976 by the Environmental Protection Agency (Agency). An amended complaint was filed on November 5, 1976. The amended complaint alleges that Respondents own and operate a refuse disposal site of approximately twenty acres located in the Southwest Quarter of the Southeast Quarter of Section 13 of Township 13 North, Range 3 West in Christian County, Illinois and that Respondents have operated the site without an operating permit since July 27, 1974 up to the date of filing the amended complaint, in violation of Rule 202(b)(1) of the Chapter 7: Solid Waste Regulations (Regulations) and Sections 21(b) and 21(c) of the Environmental Protection Act (Act). In addition thirty-five days of various violations of Rules 305(a), 305(b), 305(c), 303(a), 303(b), 303(c), 310(b), 311 of the Regulations and Sections 21(a) and 21(b) of the Act were also alleged.

The Board will dismiss the allegations of violation of Section 21(b) of the Act in connection with the permit violations. The Board has consistently held that a Section 21(b) violation cannot be based on the allegation of a permit violation.

Nine days of hearing were held in this case covering a time period from August 16, 1976 to April 1, 1977. Seventeen citizen witnesses testified. During the course of the proceeding several legal issues arose for which a disposition must be made by the Board.

First, Complainant has filed with the Board two sets of Requests to Admit: the first was filed June 1, 1976 and the second was filed on July 9, 1976. Both documents were received by Respondents' attorney (Comp. Ex. 1 and 2). Under Board

Procedural Rule 314, unless a denial or a written objection is received within 20 days after service, the matters of fact of which admission is requested are admitted. In this case Respondents had failed to answer either request. On the second day of hearing Respondents attempted to file an answer to the Request for Admissions, Second Set (R. 400). This attempt is not timely and will be denied. The facts contained in the Requests to Admit are deemed admitted.

The Board has also been requested by Complainant to take official notice of its own final order in PCB 72-23, 5 PCB 415 (September 12, 1972) under Board Procedural Rule 322. This rule allows notice to be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board. The Board does take notice of this prior final order dealing with the same site and one individual Respondent who is the same.

The Board could find violations of most of the allegations in the complaint based on the admissions; however, the Board will look to the evidence presented for further documentation of violations. For this reason the Board must consider several other issues arising at hearing. Respondent made a lengthy offer of proof covering pages 233-257 at the second day of proceedings. The question being contested concerned trash on a citizen witness' land (R. 232); however, the offer was mostly concerned with economics (R. 254). The Board finds that the offer did not prove the relevance of the question and should not be considered as part of the record. A second offer of proof (R. 1369) went to the refutation of an occurrence of an injury at the landfill; since no other reference is made to this anywhere in Complainant's case and there are no allegations mentioning such an occurrence it is irrelevant and will be stricken from the record.

The Hearing Officer's ruling excluding Complainant's Exhibits 9,10,11,13 and 20 was contested by the Attorney General and the exhibits were included as an offer of proof. The Board will affirm the Hearing Officer's ruling on this issue. Other offers of proof at pages 518,807,1303 and 1347 are accepted. Offers of proof at pages 641,1375,1387 and 1415 are denied.

At the close of the hearing a motion was made to amend the complaint to include four additional dates in Count II. Under Board Procedural Rule 328 (currently Rule 326) this is allowed as long as there is no undue surprise. Respondents objected at the time of the motion, but not at the time the evidence was presented or when cross-examination was made. The Hearing Officer allowed the amendment but requested a written amended complaint be filed within 14 days. The Board finds no reason that this amendment should not be allowed.

During the course of the hearing there was a re-occurring question concerning sufficiency of evidence to prove a lack of daily cover. There are several ways this can be shown including but not limited to: (1) photographs and/or testimony of uncovered refuse after the site is closed; (2) photographs and/or testimony of the same refuse uncovered for two or more consecutive days; (3) photographs and/or testimony of uncovered refuse in the morning prior to the operation of the site; (4) photographs and/or testimony of quantities of exposed refuse in much greater amounts than the site normally receives on a given day and beyond the capability of the available equipment to cover; and (5) photographs and/or testimony showing refuse in areas not operating on that date. On this basis there was perhaps evidence excluded that may have been helpful to the Board because it was not shown to be after the closing of the site.

The Board does find that on the basis of the admissions and on all of the evidence at the hearing there is no doubt that there is an ongoing day to day operation of this site and that Respondents do not have the required permit from the Agency (Admissions #3, R. 80). This is a violation of Rule 202(b)(1) of the Regulations and Section 21(e) of the Act.

Violations of Rule 305(a) requiring six inches of daily cover are found to have occurred on the following dates:

November 14, 1974 - Exhibit 68 taken at 4:10 p.m. shows exposed refuse. The site is run from 8:00 a.m. to 4:00 p.m. six days a week (R. 965). These hours are accepted as normal, absent a showing of irregularity.

December 17, 1974 - Exhibit 69 taken at 4:00 p.m. shows exposed refuse. The Agency witness, Mr. Eisenkoff observed old fill material that was weathered and possibly charred (R. 969-971).

January 7, 1975 - Exhibit 70 taken at 4:20 p.m. shows exposed refuse.

August 13, 1975 - Gilbert Stauffer testified that the Taylorville Landfill received 150 cubic yards of refuse a day, based on his own knowledge and what Mr. Broverman told him (R. 289,290). At 9:30 a.m. on August 13, 1975 John Diefenback observed 1,000 to 1,200 cubic yards of piled uncompacted refuse (R. 449).

August 19, 1975 - Mr. Eisenkoff observed at least 200 cubic yards of exposed refuse after 6:00 p.m. (R. 1032, 1042, Ex. 71-75).

September 10, 1975 - John Taylor visited the site at approximately 3:30 p.m. until after 4:00 p.m. and observed in excess of 1,000 cubic yards of refuse laying uncovered at the landfill site (R. 936, 938).

October 1, 1975 - Mr. Eisenkoff visited the site at 3:55 p.m. and stayed approximately two hours (R. 1050). He observed approximately 400 to 500 cubic yards of exposed refuse (R. 1052, Ex. 77,79,80).

October 2, 1975 - Mr. Eisenkoff arrived at the site at 4:15 p.m. and stayed approximately two hours (R. 1092). The same area of the site observed the day before still had approximately 500 cubic yards or more of exposed refuse (R. 1094).

November 24, 1975 - Mr. Diefenback visited the site at approximately 10:00 a.m. and observed approximately 3,000 to 4,000 cubic yards of piled refuse (R. 460,461). During this inspection Mrs. Baker stated the site had not been covered since the previous week (R. 473). Complainant's Exhibits 37,38,39 all show identical areas of exposed refuse on November 24 and 25, 1975. Several other photographs also show the same areas (Comp. Ex. 31-36, R. 492-498).

April 6, 1976 - Mr. Stauffer was at the site at 8:30 a.m. (R. 145). He observed approximately seven to eight acres on which there was exposed refuse (R. 297).

June 22, 1976 - Mr. Stauffer visited the site at approximately 3:30 p.m. (R. 307). He took Complainant's photographic Exhibits 17 and 19. On June 23, 1976 he returned at approximately 3:30 p.m. and observed the same volume of refuse as the day before, estimated at over 8,000 cubic yards (R. 30, Comp. Ex. 20-23).

June 23, 1976 - See paragraph above concerning June 22, 1976 noting Exhibits were taken at 4:00 p.m.

July 1, 1976 - Mr. Stauffer visited the site at approximately 11:30 a.m. and observed an estimated 7,000 to 8,000 cubic yards of exposed refuse (R. 316,317).

Also alleged are violations of Rules 303(a) and 303(b). Rule 303(a) provides that all refuse must be deposited into the

toe of the fill or the bottom of a trench. Rule 303(b) provides that all refuse shall be spread and compacted as rapidly as deposited and placed in layers not to exceed a depth of two feet. Proof of violations can be either by photograph or testimony. The Board finds sufficient evidence to find violations of these rules as follows:

January 14, 1974 - Complainant's Exhibit 8 is self-evident that the refuse was not placed in a trench or at the toe of the fill. It was also not spread and compacted. Both rules were violated.

February 5, 1974 - Only a violation of Rule 303(b) is alleged. Mr. Diefenback observed mounds of uncompactd refuse (R. 436).

November 14, 1974 - A violation of Rule 303(a) is evident in Complainant's Exhibit 67.

December 17, 1974 - Rule 303(b) violation; see Complainant's Exhibit 69.

January 7, 1975 - Rule 303(b) violated (Comp. Ex. 70).

August 19, 1975 - Rules 303(a), 303(b) violated (Comp. Ex. 71-75).

October 1, 1975 - Rules 303(a), 303(b) violated (Comp. Ex. 77-80).

October 2, 1975 - Rules 303(a), 303(b) violated. Same refuse previously observed was exposed and uncompactd (R. 1094).

November 24, 1975 - Rules 303(a), 303(b) violated (Comp. Ex. 31, 32, 33).

November 25, 1975 - Rules 303(a), 303(b) violated (Comp. Ex. 34, 35, R. 480).

September 14, 1976 - Rule 303(a) violated (Comp. Ex. 46, 50).

September 16, 1976 (Comp. Ex. 62).

April 6, 1976 - Rules 303(a), 303(b) violated (Comp. Ex. 15, 16).

June 22, 1976 - Rules 303(a), 303(b) violated (Comp. Ex. 17, 18).

June 23, 1976 - Rules 303(a), 303(b) violated (Comp. Ex. 19, 21, 22, 23).

July 1, 1976 - Rules 303(a), 303(b) violated (Comp. Ex. 24-27).

Open burning violations have also occurred at the Taylorville site. There is sufficient evidence in the record to find violations of open burning on November 24, 1975 (Comp. Ex. 31, 32, R. 460), November 25, 1975 (Comp. Ex. 34-36, R. 477), November 26, 1975 (R. 1095, 1096), September 14, 1976 (Comp. Ex. 47-52, R. 747, 870), September 15, 1976 (Comp. Ex. 53-55) and September 16, 1976 (Comp. Ex. 43, 44, 62). On September 14, 1977, Mr. Broverman stated he did not know how the fires started and that the Taylorville fire department would not respond to the fire (R. 756). During the proceedings Respondents contended that the Agency must show intent in order to prove an allegation of causing or allowing open burning. This is not correct. Knowledge or scienter is not an element of violation under the Act, Frank Cobin v. PCB et al, 16 Ill. App. 3d 958 (5th Dist. 1974), Bath, Inc. et al v. PCB et al, 10 Ill. App. 3d 509 (4th Dist. 1973). The fact that a fire has occurred accidentally can be shown in mitigation.

Before the Board can make a determination of final remedy in this case it must consider facts and circumstances as required by Section 33(c) of the Act. The burden of proof in this consideration also was questioned by Respondents. This has been resolved in Processing and Books v. Pollution Control Board, 64 Ill. 2d 68, 351 NE.2d 865 (1976). Complainant must meet the burden of persuasion on the essential elements of the offense; however, it is the burden of the Respondents to show compliance would be unreasonable under Section 33(c) of the Act.

Very little information relative to Section 33(c) of the Act was presented. Approximately twenty citizens voluntarily testified most of whom were concerned about the consequences of the landfill closing. None stated opposition to requiring compliance with the Regulations and the Act. A Board order requiring compliance with the Regulations and the Act is not a shut down order. The Board will consider what evidence the record does provide. The injury to the public is multi-faceted. Two citizen witnesses appeared to state their opposition to the way the site is currently operated (R. 216, 264). Because of lack of cover, trash is blown or dragged back onto the road from the site (R. 218). LeRoy Harris stated that numerous times in rainy weather the road by the site has been impassable because of mud and

trash (R. 217). These occasions have required him to get out of the car and clear the road of boards with rails and trash to make it passable (R. 217). Mr. Harris further stated that approximately a year before the August 1976 hearing date that his mother suffered an apparent stroke; an ambulance was summoned but was forced to take an alternative route because the road was unfit for travel (R. 218). Phyllis Harris (sister-in-law of LeRoy Harris) also objected to the site because it is an eyesore and it causes problems on the road (R. 266). She also expressed concern that the site would have bad health effects (R. 266,267).

There is also injury to the public in terms of by passing the permit system enacted by the Act and Regulations. The permit system is created to protect the public from pollution before it occurs. Respondents' failure to provide this protection in light of many notices (Comp. Ex. 28, R. 80, 473,961, PCB 72-23) only aggravates the injury. Improperly run sites, particularly those lacking adequate cover, have great potential for producing leachate which pollutes the water, providing conditions ripe for fires, and providing favorable conditions for rats, flies and other vectors.

The social and economic value of this site as it now exists is questionable. Certainly the people of Christian County should have a properly permitted and operated sanitary landfill in which to discard their refuse. There are landfills in contiguous counties that would be available for use (R. 558). Respondent did bring in numerous citizens to testify to costs involved at other landfills. These witnesses do not qualify as experts. It is apparent that equipment and financing of landfills are expensive (R. 1215,1216,1295). However, no effort was made by Respondents to tie any of this information to the problems of the operation at Respondents' site at Taylorville. There was no actual analysis of what it would cost to bring the site into compliance.

Other than availability for refuse disposal there was no evidence concerning priority of location. Respondents do possess a development permit. This is evidence that if the site were properly developed that the location and geological conditions are appropriate for a solid waste disposal site.

Respondents made no showing that their site was unique in terms of technical or economic practicability from any other permitted site in the state. Respondents gained an unfair economic advantage over other permitted sites by operating in violation of the standards.

Financial disclosure by Respondents provided the following information concerning the Taylorville Landfill:

<u>Year</u>	<u>Gross Receipts</u>	<u>Expenditures</u>
1974	\$53,361	\$50,666
1975	\$70,565	\$65,165
1976	\$81,102	\$78,000

Respondents introduced as Exhibits 20 and 21 contracts for the years 1974 and 1976 respectively. These contracts provide for excavation work at the Taylorville Landfill. Respondents also have several oral contracts (R. 1425). These contracts would be evidence of ability to come into compliance with the Regulations and the Act. The Board can only note that Respondents have the responsibility of enforcing the contracts they have made.

The admissions are sufficient to cover all the dates in the complaint. There is a great deal of additional substantiation contained in the record. In light of the blatant ongoing violations of the Act and Regulations, the Board finds that a heavy penalty is necessary to aid in the enforcement of the Act. A penalty of \$10,000 will be assessed jointly and severally. The Board feels that this penalty is inadequate considering the length and degree of ongoing violations; however, a greater penalty may delay compliance. Respondents will be required to cease and desist from further violations of the Regulations and the Act.

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

ORDER

It is the Order of the Pollution Control Board that:

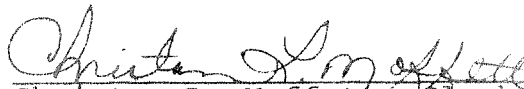
1. The allegation of violation of Section 21(b) of the Environmental Protection Act in relation to the alleged permit violation is dismissed.
2. Harold Broverman and Theodora Baker, d/b/a Taylorville Landfill are found to be in violation of: Rule 202(b)(1) of the Board's Solid Waste Regulations and Section 21(e) of the Act from July 27, 1974 to April 21, 1976; Rule 305(a) on twenty-eight days from January 14, 1974 to July 1, 1976; Rule 305(b) on nineteen days between March 7, 1974 and July 1, 1976; Rule 305(c) on twenty-four days from January 14, 1974 to July 1, 1976; Rule 303(a) on seventeen days from October 4, 1974 to July 1, 1976;

Rule 303(b) on twenty-two days from January 14, 1974 to July 1, 1976; Rule 303(c) on February 5, 1974; Section 21(a) of the Act on April 1, 1974 and February 3, 1975; Rule 310(b) on fourteen days from January 14, 1974 to March 4, 1976; and Rule 311 on seven days from November 20, 1975 to September 16, 1976.

3. Respondents shall cease and desist all further violations of the Regulations and the Act. Unless an operating permit is issued within 120 days from the date of this order the site shall be closed.
4. Respondents shall pay a penalty of \$10,000 jointly and severally within 35 days of this Order. Payment shall be by certified check or money order payable to:

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

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 10th day of November, 1977 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board