ILLINCIS POLLUTION CONTROL BCARD
June 18, 1976

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 75-56
	)	
RANDALL L. LOVELESS,	)	
	)	
Respondent.	)	

Ms. Marilyn B. Resch, Assistant Attorney General, appeared for the Complainant;
Mr. Thomas P. Carmody, Attorney, appeared for the Respondent.

OPINION AND ORDER OF THE BCARD (by Mr. Zeitlin):

This matter is before the Board on a Complaint filed by the Environmental Protection Agency on February 6, 1975, alleging that Respondent Loveless' operation of a cattle feedlot in Macoupin County, Illinois caused violation of Sections 12(a) and 12(d) of the Environmental Protection Act and Rules 203(a), 203(d) and 203(f) of Chapter 3: Water Pollution, of the Board's Rules and Regulations. Ill. Rev. Stat., Ch. 111-1/2, §§ 12(a), (d) (1975); PCB Regs., Ch. 3, Rules 203(a), (d), (f). An Amended Complaint filed June 11, 1975 was withdrawn, (R.9).

At a hearing held in Carlinville on June 19, 1975, the parties introduced a Stipulation of Fact providing only the essentials concerning Mr. Loveless' ownership of the feedlot in question, its basic operations, and the surrounding geography, (Compl. Ex. 1). Additional evidence and exhibits were received at that hearing and at additional hearings held on June 20, July 17 and December 30, 1975. As discussed below, the Board has previously dealt with this Record when issuing an Interim Order, dated September 18, 1975, overruling the Hearing Officer on certain evidentiary matters.

At all times pertinent to this matter, Respondent Loveless operated a feedlot facility located about 7 miles south of Carlinville, (R. 451). Until late 1974, the feedlot was capable of accommodating 4,000-5,000 head of cattle, with an average of 3,500 head actually on the lot, (Compl. Ex. 1). In December, 1974 and January, 1975, Respondent abandoned approximately one half of this capacity by abandoning eight of the individual cattle lots on the site, (R. 456). The facility also has four pit silos (R. 451), two of which were closed during the pendency of this case, (R. 455).

An unnamed natural stream runs through Respondent's property, adjacent to the pit silos and certain of the individual cattle feeder lots. That unnamed natural stream discharges into Spanish Needle Creek, which also runs through Respondent's property, approximately 150 yards south of the feedlot facility, (Comp. Ex. 1).

The Complaint alleges that Respondent's operations have caused contaminants to enter both the unnamed natural stream and Spanish Needle Creek, in violation of Section 12(a) of the Act. Those same discharges are alleged to have caused the presence of unnatural sludges and bottom deposits, unnatural color, turbidity and odors in both the unnamed natural stream and Spanish Needle Creek, in violation of Rule 203(a), as well as dissolved oxygen and ammonia nitrogen levels in violation of Rules 203(d) and 203(f). Finally, Respondent is alleged to have caused the deposition on land of contaminants (manure, silage, etc.), so as to cause a water pollution hazard with respect to both streams in violation of Section 12(d) of the Act. The violations are alleged to have continued from April 16, 1972 through the filing of the Complaint; in addition, the Complaint notes specific dates of alleged violation during that period for each of the above sections of the Act or our Rules.

For individual discussion, the alleged violations can be broken into three specific areas. The first of those is the alleged violation of Rules 203(d) and 203(f) with regard to Spanish Needle Creek (Count I) and the unnamed natural stream (Count II). The Agency's proof with regard to these allegations consisted of analytical test reports showing the result of analysis performed by the Agency's laboratory on samples taken over a period of time from those streams. Admission of those test results into the Record was the subject of our earlier Interim Order, and the admission and use of those results to show violation is still contested by Respondent on six distinct grounds:

Hearsay: Respondent argues that the test results do not fall within the exceptions to the hearsay rule.

Best Evidence: Respondent argues that in three of four instances for which the Agency has provided test results, the Record contains photostatic copies of the test result forms rather than the original forms themselves.

Due Process: Respondent here argues that the use of the analyses evidenced by the Agency test result forms is improper because of the destructive analysis used by the Agency, and because representative samples were not available for independent analysis by Respondent.

Due Process: Respondent argues that the Agency's use of the samples which were taken from Respondent's property without notification that they might be used, or would be used, in an enforcement action, violates Respondent's constitutional rights.

Relevancy and Competence: Respondent argues that the test results are neither relevant nor competent to show violation, because the Agency failed to show adequately the weather and other conditions prevailing at the time the samples were taken.

Affirmative Defense: Respondent argues that because the United States Environmental Protection Agency issued an NPDES permit for Respondent's operation, which permit contained later compliance dates than some of the dates for which violation was alleged, and which contained exception provisions for adverse weather conditions, that permit -- in whose issuance the Illinois Environmental Protection Agency was involved -- provides an absolute defense.

We find none of these arguments convincing.

Witnesses and exhibits presented by the Agency make two essential points clear:

1. The quality of the unnamed natural stream and Spanish Needle Creek was degraded, consistent with the allegations in the Complaint;

2. Such degradation was the result of run-off and other flows from Respondent's feedlot operation.

Samples taken by Mr. Leinicke of the Environmental Protection Agency on May 31, 1972, January 3, 1973, October 9, 1973, and July 30, 1974, (Ex. 13-28) indicate violations of the standards for dissolved oxygen and ammonia nitrogen in Rules 203(d) and 203(f). Testimony at the December 30, 1975 hearing by Mr. Leinicke, Mr. Totoraitis, and Mr. Hutton, for the Agency, established that the water samples were taken and subsequently analyzed within the Agency's normal routine. They are convincing on the issue of violation.

Dealing with the last of Respondent's objections first, we find that the issuance of an NPDES permit is, prior to State assumption of NPDES authority, immaterial to the issues here. Nor, second, do we find the lack of extensive testimony concerning weather conditions at the time of sampling to be sufficient to require exclusion of the samples and their subsequent analyses. Even in instances where rain was falling (e.g., R. 64), this is immaterial on the issue of violations such as those alleged here; whether Respondent caused such violation in dry or wet weather is immaterial -- the violations nonetheless existed.

Respondent's argument that the water quality samples were improperly taken is without merit. Sections 4(c) and 4(d) of the Act specifically authorize the testing conducted by the Agency in this instance.

Respondent's claim that the destructive analysis performed by the Agency, and the Agency's subsequent failure to provide samples of those analyses to Respondent, are similarly without merit. This issue was decided in part in our Interim Order, supra, and need not be discussed at length here. It is sufficient to note that the Agency has shown that the samples taken for this type of analysis are not amenable to preservation.

Finally, in this regard, we find neither Respondent's best evidence nor his hearsay arguments convincing. The water quality analyses samples (Ex. 17-28), are acceptable both as public records and under the business records exception to the hearsay rule. In addition, the copies submitted by the Agency of those analyses were accepted only after a showing that the originals were unavailable after a reasonable search.

Turning next to the alleged violation of Rule 203(a), we again find that the Agency's case has been made. With respect to both Spanish Needle Creek and the unnamed natural stream, testimony by Mr. Leinicke, Mr. Hite (e.g., R. 195-218), Mr. Tucker (e.g., R. 234-247), and Mr. Frank (e.g., R. 289-296), showed that Mr. Loveless' operations did indeed cause a violation of Rule 203(a), in that both waters contained unnatural sludge and bottom deposits, odor, unnatural plant and algae growth, unnatural color and unnatural turbidity. That testimony is further buttressed by the photographs submitted by the Agency, clearly showing violations (Compl. Ex. 3a-3o, 4a-4i, and 5a-5e).

Turning to the alleged violation of Section 12(d) of the Act, we again have little difficulty finding a violation. Respondent's deposition of silage in four pit silos, along with the accumulated manure associated with the various individual feedlots and the existence of an underground spring, unquestionably caused the problems described above. That being the case, there is no question that the hazard prohibited in Section 12(d) existed during the period complained of. Although Mr. Loveless did abandon two of the pit silos (R. 455), as of the time the complaint was filed, there were still considerable deposits of manure on the hillside above the unnamed natural stream and Spanish Needle Creek (R. 407, 466). Although, as will be noted below, this problem may now be remedied, there is no question of the fact that the violation did exist during the relevant period.

Having found that the Agency has made its case and shown all the violations alleged, we must now turn to consideration of those factors in Section 33(c) of the Act, and the various matters pleaded in mitigation by Respondent. First, considering the nature of the injury caused by Mr. Loveless' operations, we find that such injury was significant, and resulted in degradation of the quality of the unnamed natural stream and, more importantly, Spanish Needle Creek. Agency testimony concerning biological surveys of Spanish Needle Creek indicate that the degradation in the area immediately downstream of the confluence of the unnamed natural stream with Spanish Needle Creek was serious (e.g., R. 209). Although Respondent objected to the introduction of testimony concerning the biological surveys conducted by the Agency, the surveys indicated that the stream was polluted. Using the Agency's explanation of what the survey classifications indicated to the individuals taking the surveys (R. 234), and what those classifications empirically indicated, along with the testimony presented, we have no difficulty finding that the damage caused was severe.

The Agency's brief does not question the social and economic value of Mr. Loveless' feedlot operations. Nor, by virtue of its rural setting, do we have any doubt regarding the suitability or unsuitability of Mr. Loveless' operation for the area in which it is located. While there may be some question regarding the location of the feedlots adjacent to a stream, in such a manner as to allow run-off to enter that stream, we find that proper controls can make such a location entirely suitable. It is evident, as will be discussed below, that Mr. Loveless has initiated such controls.

The technical practicability and economic reasonableness of eliminating Mr. Loveless' discharges has also been resolved. Testimony indicated that by approximately the same time that the Complaint in this matter was filed, Mr. Loveless' operation achieved compliance with the applicable regulation (e.g., R. 496, 504). As early as 1968 or 1969, Mr. Loveless constructed a small holding lagoon for run-off from the feedlots (R. 453). Subsequently, in his efforts to achieve compliance, Mr. Loveless has closed approximately one-half of the individual feedlot areas on his property, constructed an additional larger lagoon to hold run-off, and built and later strengthened a berm separating a run-off interceptor ditch from the unnamed natural stream.

Although testimony indicates that during the period alleged in the Complaint there were breaches and overflow from the small lagoon and the run-off interceptor ditch, it now appears that this is no longer a problem. Mr. Loveless has constructed a piping system to remove run-off liquids from the smaller holding pond, and pumps those liquids to the larger holding pond, which is estimated to have two years holding capacity (R. 455).

In addition, Mr. Loveless has closed two of his pit silos, which discharged leachate into the unnamed natural stream, and has installed equipment to pipe liquid discharges from the remaining pit silos into the larger of his two holding ponds. The sum of these actions apparently serves to -- for at least the present -- alleviate all problems from the Loveless feedlot operation.

Although the Agency argues in its brief that Mr. Loveless' compliance plan is of a temporary nature, because the lagoons will be at full capacity after approximately two years, and presented testimony concerning appropriate permanent control techniques (e.g., R. 302), we do not find that the Record before us would justify ordering the installation of any irrigation system such as that suggested by the Agency. Mr. Loveless testified (R. 474), that he is currently investigating several methods of permanent compliance, including those suggested by the Agency, and we feel that this matter is best left for Mr. Loveless. His past actions have resulted in compliance, and should assure compliance for the immediate future (i.e., approximately two years).

All of the above actions were taken by Mr. Loveless during what seem to have been relatively constant, if disorganized and occasionally haphazard, good faith attempts to achieve compliance with the applicable rules and regulations. Mr. Loveless attended conferences with the Agency (R. 373) and, although he did not achieve compliance within the period envisioned by the Agency, he apparently did offer considerable cooperation to the Agency. These facts, coupled with the Agency's admission that it has allowed longer periods for other feedlot operators to achieve compliance, lead us to find that no penalty would be appropriate in this instance.

The Agency feels that a penalty would be appropriate only as an example to the operators of other feedlots. While a penalty might have such a salutory effect, we do not feel that such a rationale is appropriate here, where the Respondent has already achieved compliance, and was subject to the first enforcement case of this nature. Respondent has expended considerable sums to achieve compliance over the past several years. The construction of Respondent's present control facilities (the two lagoons, the interceptor ditch, the pipelines, the pumping system, etc.) have indicated an ongoing good faith effort to achieve compliance, (e.g., R. 457-463). Any additional expenditures by Mr. Loveless would best be on upgrading the present facilities to allow for permanent compliance.

We shall, therefore, instead of imposing a penalty, order that Respondent Loveless cease and desist all violations. We shall also require that he submit to the Agency, within one year, a plan for permanent compliance with the Regulations which this Record indicates were violated. We leave to Mr. Loveless the substance of such a plan.

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 Randall L. Loveless is found to have violated Sections 12(a) and 12(d) of the Environmental Protection Act, and Rules 203(a), (d) and (f) of Chapter 3: Water Pollution, of the Pollution Control Board Rules and Regulations in the operation of a feedlot in Macoupin County, Illinois, from April 16, 1972 until February 6, 1975.

2. Respondent shall cease and desist the above violations.

3. Respondent shall, within one year of the date of entry of this Order, submit to the Environmental Protection Agency a plan for the permanent control of discharges from his feedlot operations.

Mr. James Young abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 18th day of June, 1976, by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board