ILLINOIS POLLUTION CONTROL BOARD

January 3, 1974

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	PCB 72-485
	)	
MILAM CORPORATION	)	
MILAM CORPORATION EAST	)	

Delbert Haschemeyer, Assistant Attorney General for the EPA
Thomas A. Lechien, attorney for Respondent Milam
Hillary H. Hallett and Keith Fitzgerald, attorneys for Respondent Milam East

OPINION AND ORDER OF THE BOARD (by Dr. Odell)

The Environmental Protection Agency (hereinafter called EPA) filed a Complaint on December 11, 1972, against Milam Corporation (hereinafter called Milam) alleging violations of the Environmental Protection Act (hereinafter called Act) and numerous violations of the Rules and Regulations for Refuse Disposal Sites and Facilities (hereinafter called Rules and Regulations). The landfill is located in the Southwest 3/4 of the Northwest ¼ of Section 5, Township 2 North, Range 9 West, in the County of St. Clair, State of Illinois. The Complaint charged Respondent Milam with violating Sections 21(a), (b) and (e) of the Act, which prohibit open dumping of garbage, open dumping of refuse, and operating without a permit. Section 21(e), the permit violation, was a continuing offence; whereas, thirteen named dates from July 1970 through July 1972 were specified for violations of Section 21(a) and (b) of the Act. Next, the Complaint alleged that Respondent carried out open dumping, neglected pre-operational site improvements, unloaded refuse without supervision and failed to police the area, failed to comply with the continuous and daily spreading and compacting procedures, did not apply final cover, and deposited hazardous liquids at the site, all in violation of Rule 3.04, 4.03, 5.04, 5.06, 5.07(a), 5.07(b), and 5.08 of the Rules and Regulations. These violations occurred at various specified times as stated in the Complaint from July 1970 through July 1972.

On March 14, 1973, EPA filed an amended Complaint. It alleged that Section 21(e) of the Act and Rule 4.03 were still being violated and added additional violation dates concerning Sections 21(a) and (b) of the Act and Rule 3.04, 5.04, 5.06, 5.07(a), and 5.08 of the Rules and Regulations. The additional violations covered a six-month period from September 1972 through February 1973.

The first hearing was held on April 4, 1973; and on May 30, 1973, the second and final hearing was held in the case. During the first hearing, EPA deleted four dates from July 1970 through October 1970 from its Complaint, and changed December 26, 1972, to December 24, 1972, to make the pleadings conform with the proof. Respondent Milam was represented by counsel, Mr. Lechien; and Respondent Milam Corporation East (hereinafter called Milam East) was represented by Mr. Fitzgerald, and later by Mr. Hallett, a member of the same law firm.

Various motions have been made by the parties and were made part of the record. EPA made the following motions:

(1) Motion to file amended Complaint (March 14, 1973).
(2) Motion to add party co-respondent, Milam East (April 13, 1973).

Milam East made the following motions:

(1) Motion to strike amended Complaint. This was made during the first hearing.
(2) Motion to exclude testimony of inspector Child.
(3) Motion to strike all the dates from the Complaint on which no evidence has been offered.
(4) Motion to strike evidence of violations where no photographs exist showing the violations alleged have existed for 24 hours.
(5) Motion to strike and dismiss proceeding for illegal entry.

Milam made the following motion:

(1) Motion to dismiss the Complaint.

EPA's motion to file the amended Complaint is granted. First, we note that the Certificate of Mailing attached to the amended Complaint does not satisfy Procedural Rule 305(b) which states:

> (b) All pleadings, motions, and discovery notices, after notice and complaint shall be served personally or by registered or certified United States mail.

Mr. Haschemeyer, the attorney for the EPA, attempted to overcome this objection by indicating he had personally mailed a copy of the motion by Certified Mail to Mr.Hallett (HR1-5). [Since the pagination for hearings one and two is not continuous, the specific page will be prefaced by identifying the particular hearing record, i.e., HR1 or HR2.] Although Mr. Haschemeyer failed to introduce the receipt into evidence, we hold that he has satisfied the test of the Original Document Rule (see McCormick on Evidence, 2nd Edition, 560 (1972)). The information in Mr. Haschemeyer's verbal statement is sufficiently reliable that failure to introduce the receipt is harmless error. Furthermore, Mr. Fitzgerald did not actually dispute the accuracy of the evidence; rather, he stated that he did not have a record of

having received the motion (HR1-5).

Second, Mr. Fitzgerald objected to the amended Complaint on the grounds that its late mailing did not give him thirty days to investigate the allegations in the Complaint. Rule 308(c) of the Procedural Rules makes clear that failure to respond to the motion within five days of service of the motion means that the party is deemed to have waived objection to the granting of the motion.

EPA's motion to add Milam East as a party co-respondent is granted. Respondent did not object to this motion under Rule 308(c) within five days. Second, no prejudice resulted to Milam East in that it actively participated in the April 4, 1973 hearing, as well as in all other stages of litigation.

Milam East's motion to exclude the testimony of inspector Child is denied. The showing of bias of a witness goes to the question of credibility of testimony, not to the exclusion of evidence. Besides Mr. Child's association with the EPA, there is little information in the record to support Respondent's motion. Furthermore, the transmittal letter of the Hearing Officer to the Board states that the credibility of witnesses is not an issue in this case.

Respondent's (Milam East) motion to strike all dates from the Complaint on which no evidence was offered is allowed. Most of these dates were actually struck by EPA at the first hearing (HR1-127, 128). These dates - July 29, 1970; September 10, 1970; October 7, 1970; and October 15, 1970 - were struck from violation of Sections 21(a) and (b) of the Act and Rules 3.04, 5.04, 5.06, and 5.07(a) of the Rules and Regulations. No evidence was offered on a violation of Rule 5.08 on September 10, 1971, or to a violation of Rule 5.06 on November 29, 1972. These are also struck.

Respondent's (Milam East) motion to strike evidence of violations where no photographs exist showing the violations alleged have existed for 24 hours is granted in part. It is limited to those Rules which measure violations in terms of a 24-hour period. Rule 5.07(a) speaks of daily cover. We agree with Respondent's conclusion that "daily cover" demands a continuous 24-hour violation (HR2-96 to 123). Under Rule 5.07(a), May 3 and 4 are the only dates that withstand this test. Furthermore, we are not convinced that EPA's letter of September 27, 1972 (HR2-302, Comp. Ex. #35) gave Respondent notice of the midnight closing time. The statement of the EPA witness that the mailing of such letters is a routine business procedure, but that he did not know whether this letter had been mailed (HR2-307), does not assure us that the letter had in fact been mailed to Milam East. Since Complainant claims to have mailed the letter, we think someone with more direct knowledge, like Mr. Clark, should have been called to testify concerning this fact. The Complaint is therefore struck as to Rule 5.07(a), except for the dates of May 3 and 4, 1972.

Respondent's (Milam East) motion to strike and dismiss the proceedings for illegal entry is denied. The recent U.S. Supreme Court case of United States v. Biswell (406 U.S. 311) is controlling. In that case the Court held that a federally licenced pawn shop operator was subject to warrantless searches and seizures under the Gun Control Act of 1968. The Court stated that (406 U.S. 315): "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute". Furthermore, the Court said (406 U.S. 316): "It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment". In this situation, Section 4(d) of the Illinois Environmental Protection Act is clearly applicable. It permits searches and seizures "in accordance with constitutional limitations" which were satisfied in this case.

On April 13, 1973, Milam filed a motion to be dismissed from the action. We grant the motion in part. The facts establish that Milam East leased the property from Milam on October 1, 1971, (HR1-10 ; Resp. Ex. #5) and has continued to lease the land since that date. First, we hold that Milam is not liable as lessor under the Act or Rules and Regulations in this case. The test for lessor liability is whether a lessor receiving economic benefit under a lease has the capacity to control the actions of the lessee. See EPA v. James McHugh Construction Co. et al. #71-291, 4 PCB 511, 513 (May 17, 1972). Although lessor cannot relieve himself of such responsibility through contract with the lessee, we hold that where the companies are distinct and unrelated and where the operation is an extensive one, lessor should not have the burden of seeing to it that lessee obeys the law. Second, the evidence in this case is sufficient to establish that Milam operated its site prior to October 1, 1971, without a permit under Section 21(e) of the Act. The facility was operating as a landfill before October 1, 1971, (HR1-19), and the permit violation has been established. Evidence was offered by Mr. Hartbarger, an employee for Milam East, that Respondent Milam operated without a permit (HR1-11). Mr. Lechien did not challenge Mr. Hartbarger's testimony as to this fact, although by failing to object, Mr. Lechien only waived the preliminary proof that the witness was qualified to respond concerning such information. Since this

evidence was not rebutted, we find a violation of Section 21(e) of the Act (see McCormick on Evidence 2nd Edition 21 (1972)). Third, since all other violations of the Act and Rules and Regulations occurred after October 1, 1971, the Complaint is dismissed as to all other allegations.

The final procedural matter is to note that although the Rules and Regulations have now been superceded by Chapter Seven: Solid Waste Regulations of the Pollution Control Board, the liability of Respondent Milam East 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 for Chapter Seven was July 27, 1973. All violations under this Complaint occurred prior to this date.

Turning to the merits, we find that Milam East has violated Sections 21(a), (b), and (e) of the Act and Rule 4.03, 5.04, 5.06, 5.07(a), and 5.08 of the Rules and Regulations.

The evidence offered by Complainant was not refuted. Beer cans (HR1-39; Comp. Ex. #6) were seen at the site on April 4 and 5, 1972. This violates Section 21(a) of the Act. Section 21(e) was admitted to be violated by Respondent (HR2-5). Section 21(b) of the Act is violated when the Rules and Regulations are violated. These Rules and Regulations were breached in the following manner. Rule 4.03 requires permanent fencing, all-weather roads, and shelter areas as a condition precedent to the operation of a landfill. Permanent fencing was not installed until sometime in July 1972 (HR1-48). Rule 5.04 is violated when unloading is not properly supervised and portable fencing is not used. Portable fencing was lacking on March 8, 1972 (HR1-89), April 4, 1972 (HR1-28), and May 3 and 4, 1972 (HR1-43,44). Blowing litter was observed on April 4 and 5, 1972 (HR1-28 to 31). The blowing litter is circumstantial evidence that inadequate policing was being carried out. Section 5.06 of the Rules and Regulations requires continuous spreading and compacting of refuse. On October 13, 1971, refuse was seen stacked high on the face of the landfill and spreading was not occurring (HR1-21). Photographs (Comp. Ex. #4 and #5) on April 4 and 5, 1972, show that refuse was not being compacted in shallow layers as rapidly as it was admitted to the site. The photographs for June 7 and 8, 1972 (Comp. Ex. #14, #15, #16, #17, and #18), evidence the same kinds of activity observed on April 4 and 5. The depth of the refuse indicates that the 2-3 foot layering requirement was not being implemented. Spreading and compacting was also not carried out on July 19, 1972 (Comp. Ex. #24). Similar violations occurred on July 25 (Comp. Ex. #23 and #26) and July 26 (HR1-56). Failure to spread and compact was also documented on December 24 and 25, 1972 (Comp. Ex. #28, #29, and #30). These numerous violation dates tend to refute Respondent's assertions that cover was being continuously applied (HR2-315).

Rule 5.07(a) was violated during the 24-hour period of May 3, 1972, to May 4, 1972, (Comp. Ex. #11 and #12), in that a compacted layer of six inches of material was not used to cover the exposed material at the end of each working day.

Rule 5.08 prohibits the deposition of liquids without approval from the EPA. Much evidence was submitted by EPA of liquids discarded from barrels. The photographs indicate (Comp. Ex. #1, #2, and #9) that materials poured from barrels existed on the site on April 4, 1972. Liquids were present at the site on July 21, 1972, (Comp. Ex. #22; HR1-54), and May 3, 1972, (Comp. Ex. #13) and May 4 (HR1-44). Respondent admitted that barrel discharge was a problem (HR2-222) and stated that radioactive materials were inadvertently delivered to the site on one occasion (HR2-216).

We find it unnecessary to decide whether the open dumping prohibition of Rule 3.04 has been violated in this case. Open dumping is a catchall term that embraces a number of specific infractions alleged elsewhere in the Complaint. In light of our above findings regarding the more specific counts, we need not decide whether Rule 3.04 has been violated here. See EPA v. Clay Products, Inc. #71-41; 2 PCB 33 (June 23, 1971). Also, we hold that insufficient evidence has been presented to find a violation of Rule 5.07(b), the final cover requirement. The testimony offered (HR1-44) stated the conclusion that no final cover had been applied. This information, standing alone, is not enough to establish a violation of Rule 5.07(b).

Respondents case in chief was aimed previously in support of penalty mitigation. United Disposal Company is the parent company of Milam East and Mal, another landfill, subject to Illinois law, located on Chouteau Island (HR2-285 to 288). EPA had requested United Disposal Company to first obtain a permit for Mal, and then proceed with Milam East later (HR2-9, 252). An attempt to get a permit for Milam East had been initiated in November 1971 (HR2-16). Engineers have been working to qualify Milam East for a permit since late 1972, a short time after Mal got its permit (HR2-38). Testimony was offered that Respondent is trying to operate a model landfill (HR2-280), but that it has taken time to get everything done. A main problem confronted Mal landfill in the spring of 1973 when Mississippi River flooding caused it to be closed down so that additional refuse had to be transferred to Milam East (HR2-187). At the time Mal received its permit, Milam East was approved as an alternate site in case Mal should have to be closed down (HR2-182). The barrels have created a problem, but Mr. Immel from the Attorney General's office had told Milam East it was satisfactory to bury them in an isolated area at the landfill (HR2-222). Evidence was offered that Milam East now handles 800 truckloads a day (HR2-288). Photographs were introduced which were taken on May 20, 1973, (HR2-63; Resp. Ex. #1 - #14) to show that the landfill is a model landfill. EPA admitted that at the present time the landfill was in pretty good shape (HR2-324).

Although numerous literal violations of the law have occurred, we believe that mitigation is called for in this case. Respondent has shown substantial good faith in its on-going program to bring Milam East into compliance with the law. Had Milam East not delayed in seeking a permit from EPA, it might have been in compliance at a much earlier date. Finally, the adverse environmental impact is minimal in this case.

This constitutes the fingings of fact and conclusions of law of the Board.

ORDER

It is the Order of the Board that:

(1) Respondent Milam pay a penalty of $400.00 for operating a landfill without a permit prior to its leasing arrangement on October 1, 1971. Name of payee and his address should be the same as that indicated for Milam East as set out in paragraph three below.

(2) Respondent Milam East cease and desist from all violations of the Act and Rules and Regulations as established under this Complaint.

(3) Respondent Milam East pay a penalty of $1,000.00 for its violation of the Act and Rules and Regulations. 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 by both Respondents within 35 days of the adoption of this Order.

Mr. Henss was not present.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted by the Board on the 3rd day of January, 1974, by a vote of 4 to 0.

Christan L. Moffett