ILLINOIS POLLUTION CONTROL BOARD
September 3, 1981

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 81-19
CITY OF MARION, An Illinois Municipal Corporation, JACK PARKS AND EARL KING,	)	
Respondents.	)	

PATRICK J. CHESLEY, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.
WILLIAM J. NOVICK, FOWLER AND NOVICK, APPEARED ON BEHALF OF THE RESPONDENTS.

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

On February 5, 1981 the Illinois Environmental Protection Agency (Agency) filed a complaint alleging that the City of Marion, Jack Parks and Earl King violated various sections of the Environmental Protection Act (Act) and various rules in Chapter 7: Solid Waste. Hearing was held on March 14, 1981, at which the parties and members of the press were present.

The Agency alleges in Count 1 that beginning June 10, 1980 and continuing through the date of the filing of the complaint that Marion, Parks, and King have violated Rule 202(a) of Chapter 7: Solid Waste, and Section 21(e) of the Act by causing or allowing the operation of a solid waste management site and refuse disposal operation at the site without an operating permit.

In Counts II-V the Agency alleges that during that same time period, the respondents failed to place refuse in the toe of the fill in violation of Rules 301 and 303(a) and Sections 21(a) and (b) of the Act; that the refuse was not spread and compacted as required in violation of Rules 301 and 303(b) and Sections 21(a) and (b) of the Act; that required daily cover was not placed over the refuse in violation of Rules 301 and 305(a) and Sections 21(a) and (b) of the Act; and that a water pollution problem was created by allowing refuse to be deposited in standing water at the site in violation of Rules 301 and 313 and Section 21(a) and (b) of the Act.

Jack Parks and Earl King own land located approximately one mile north of Marion and 1/8 of a mile east of Illinois Route 37 located on the south side of Spillerton Road (Comp. Exs. 2 and 3, para. 1). Parks and King lease this site to Marion for garbage and refuse disposal (Comp. Ex. 2, para. 4 and Comp. Ex. 3, para. 3). Neither Parks nor King has been issued a permit by the Agency to allow the operation of a solid waste management site, despite knowing that a permit is required for the development of the site (Comp. Ex. 2, paras. 8 and 9; Comp. Ex. 3, paras. 7 and 8).

The testimony of Henry Burgess (Commissioner for Marion), Keith Ice (former operator of the landfill), Raymond Walker (present operator), and Robert Butler (Mayor of Marion) establishes that Marion has operated a landfill at the site since about the beginning of June, 1980 (R.14, 19-20, 22-23, and 24-25). Marion admits that it did not have a permit issued by the Agency for the site, despite knowing that it was required (Comp. Ex. 1, paras. 5 and 6).

Respondents contend that "it would appear that the permit should have issued automatically" (Resp. Brief, p. 1) due to a failure by the Agency to act within the required 90-day period. Such an argument cannot overcome the admission that the site was unpermitted. Furthermore, as the Agency quite correctly points out, there is inadequate proof in the record to support such a claim (see Comp. Reply, pp. 1-2).

Perry Mann, an environmental protection specialist for the Agency, testified that on June 10, 1980, and again on June 19, 1980 he observed refuse being deposited in areas other than the toe of the fill (R. 46-7 and 52). Pictures taken at those times corroborate this (Comp. Exs. 5-7). His testimony is not refuted.

He also testified that on his June 19 inspection of the site that some of the refuse had not been spread and compacted (R.52-3). Again, this testimony is corroborated by photographs (Comp. Exs. 6 and 7) and is unrebutted.

Mr. Mann's testimony also supports a finding that the respondents failed to place at least 6 inches of cover material over all exposed refuse at the end of each day of operation. He observed this on July 10, July 24 and August 13 of 1980 as well as January 5, 1981 (R. 56-8, 61-3, 69, and 77). Again, photographs of the site confirm this (Comp. Exs. 8-10, 12-13, and 16-17). Furthermore, he was told by Mr. Ice on all three of the 1980 dates that the refuse had been there for more than a day (R. 57-8, 62-3, 69-70 and 77). No rebuttal testimony was presented.

Finally, Mr. Mann testified as to having observed refuse deposited in standing water on June 10, July 24 and August 13, 1980 (R. 46, 62 and 69). Photographs support this as well (Comp. Exs. 5, 9, 13 and 16). This testimony is also unrebutted.

Respondents' case is largely a fulfillment of the old saying (to paraphrase) that if the law is against you, argue the facts; if the facts are against you, argue the law; and if both are against you, argue due process. Respondents argue that the Agency had a "vendetta attitude" toward them in this matter (Resp. Brief, p. 2). They attempt to establish that a permit was unreasonably denied by the Agency.

While Marion's attempts to obtain a permit are relevant with respect to mitigation, as discussed below, the Agency's actions regarding that permit, aside from reaching a decision within the 90-day statutory period, are generally not relevant in an enforcement proceeding. Such matters should be dealt with through a permit appeal. However, no such appeal was made in this case.

The Agency requests that all such testimony be stricken from the record. The Board declines to do so since it finds that there has been no material prejudice. Further, fashioning an order to neatly excise such testimony would be nearly impossible and line-by-line excision would be unduly cumbersome. However, the Board does note that such evidence should be greatly limited, if not barred, by the hearing officer. The Board also notes, in response to Respondents' allegation that a permit appeal would have caused greater delay in obtaining a permit, that ongoing negotiations with the Agency can continue during the pendency of a permit appeal such that delay can be avoided.

Given that there is no competent testimony to rebut Mr. Mann's testimony and no meritorious defense has been presented, the Board finds that Respondents have violated all Rules and Sections of the Act cited in the complaint during the times alleged.

An examination of the factors listed in Section 33(c) of the Act demonstrates that a penalty should be assessed.

In examining the degree of injury, there are two differnet considerations. The operational violations (Counts II-IV) have resulted in minor present injury to the environment. Nowhere in the record is there any testimony as to serious harm, or even measured harm. The Agency's photographic exhibits disclose a site with some problems, but not a neglected or abused site. On the other hand, the threat of possible future harm is substantial. The failure to provide adequate daily cover and the deposition of refuse in standing water is magnified by the uncertain suitability of the site. Such actions can and do cause leachate. However, if the leachate is adequately confined, the environmental harm is minimized. Here, the Board cannot find that it is adequately confined.

Certainly, there is a social and economic value to a properly permitted and operated site, but that value is greatly diminished when the siting, development, and operation are not proper.

The suitability of the site to its location is seriously questionable. That, in fact, appears to have been the major reason for repeated denials of permit applications (R. 37, 127, 147,-151, 157-158, 172-182). This testimony relates to possible difficulties with a permeable layer of sandstone along the face of the strip pit. If not adequately lined with clay or some other relatively impermeable layer, the leachate could become a serious hazard, especially considering that the site is located only about an eighth of a mile from the nearest residence and about half a mile from a group of homes. Furthermore, the former strip pit is located in the recharge zone for the regional watershed (R. 127). While it may be true that a liner is now in place, neither Agency personnel nor even the City engineer were present during installation, and an after-the-fact determination of its placement, depth and permeability is quite difficult. Had proper permitting procedures been followed by Marion, these problems could, in all likelihood, have been avoided.

Finally, there is no serious contention that it is economically unreasonable or technically infeasible for Marion to operate a properly permitted site. The permitting process itself can rarely result in economic unreasonableness or technical infeasibilty. While Marion has had a difficult time obtaining a permit, the process may well have been much less time consuming had the permit been sought in a timely fashion and had proper procedures been followed. No reason is given for this having not been done. There is no showing of any unusual occurrence which caused the previously permitted site to be closed prematurely. Rather, it must be assumed that Marion simply did not properly plan for the closure of one site and the opening of another. As a result, both Marion and the Agency have been forced to expend more time and effort than should have been necessary for the permitting of the site, and Marion has caused a serious threat of pollution.

Parks and King, the owners of the land, could also have been instrumental in avoiding these problems had they executed their responsibilities as landowners to insure that the land was being used properly. It is for this reason that the Act and Board rules hold owners liable for such violations (EPA v. Maney, et al., PCB 79-262, 39 PCB 363, August 21, 1980).

In determining the size of the penalty to be assessed, the Board takes official notice of two prior proceedings against Marion for operating an unpermitted landfill. On May 23, 1973 the Board fined Marion $500 for various operating violations and for failure to obtain a permit (EPA v. Marion, PCB 72-510, 8 PCB 139). Again, on February 1, 1979 Marion was ordered to pay a stipulated penalty of $3,000 for similar violations (EPA v. Marion, PCB 77-312, 32 PCB 471). Three permit violations in ten years is a clear indication that Marion has a substantial disregard for the state's permitting process. Apparently,

a substantial penalty is necessary to encourage compliance with the Act and Board regulations. The Board will impose the following penalties:

City of Marion	Count I	$5,000
	Counts II-V	$ 500
Jack Parks	Count I	$ 50
	Counts II-V	$ 50
Earl King	Count I	$ 50
	Counts II-V	$ 50

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

ORDER

1. Respondents have violated Sections 21(a), (b), and (e) of the Illinois Environmental Protection Act and Rules 202(a), 301, 303(a) and (b), 305(a) and 313 of Chapter 7: Solid Waste.

2. It is hereby ordered that Respondents shall cease and desist within 120 days of the date of this Order from any and all violations as listed in (1), above; and

3. Respondent, City of Marion shall pay a penalty of $5,500, and Respondents Jack Parks and Earl King shall each pay a penalty of $100 within 30 days of the date of this Order, payment to be made by certified check or money order to:

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

IT IS SO ORDERED.

Mr. I. Goodman concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 3RD day of September, 1981 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board