ILLINOIS POLLUTION CONTROL BOARD
June 20, 1986

LANDFILL EMERGENCY ACTION COMMITTEE, an Unincorporated Association, & ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainants,	)	
v.	)	PCB 85-9
MCHENRY COUNTY SANITARY LANDFILL AND RECYCLING CENTER, INC., an Illinois Corporation,	)	
Respondent.	)	

MICHAEL KUKLA (COWLIN, UNGVARSKY, KUKLA, AND CURRAN) APPEARED ON BEHALF OF THE LANDFILL EMERGENCY ACTION COMMITTEE, AND,

JAMES I. RUBIN (BUTTER RUBIN, NEWCOMER, SALTARELLI, AND BOYD) AND JAMES G. MILITELLO (MILITELLO, ZANCK, AND COEN) APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the eight count complaint filed January 23, 1985 by the Landfill Emergency Action Committee (LEAC) against the McHenry County Sanitary Landfill and Recycling Center, Inc. (MCSL). In general, the complaint charges MCSL with improper operation of its sanitary landfill located in McHenry County, the allegations being based on inspection reports prepared by the Illinois Environmental Protection Agency (Agency) since 1974. At a hearing held September 3, 1985, at which no members of the public were present, the parties presented a "Joint Stipulation of Facts and Proposal for Relief", which was filed with the Board September 10, 1985. The Agency inspection reports were attached thereto as Exhibit A.

The parties' proposed stipulation recites that it is presented for the purpose of eliciting "findings of fact and conclusions of law from the Board, along with the approval by the Board of the compliance plan." (Stip., p. 1) The compliance plan, a response to the Count V leachate discharge allegations, involves MCSL's arrangements for closure and post-closure care of the facility; this will be described in detail below. However, in brief, the stipulation requires the MCSL to add $30,000 to its post-closure care fund. At the end of the 3 year post-closure period required by Board regulations, MCSL is required to leave $10,000 (or any lesser remaining balance) in its post-closure

care trust fund for an additional 10 years, with payouts to be made pursuant to Agency direction.

As to a penalty proposal and amendment of the terms of the settlement, the parties agree that:

> "there is no evidence of adverse impact on the environment, no penalty other than that described above is warranted. Nevertheless the Board is free, under the terms of this stipulation, to make such findings and to impose such different or additional relief as it believes is necessary and appropriate. Should different or additional relief be imposed by the Board, both parties reserve the right to challenge the reasonableness of such relief on appeal." (Stip., 15)

On November 21, 1985 the parties filed a Supplemental Joint Stipulation in response to an October 10, 1985 Interim Order of the Board identifying various areas of Board concern concerning the parties' intentions and the reasonableness of the compliance plan.

Inasmuch as the proposed stipulation would require actions by the Agency, which had not heretofore been a party to this action, by Order of April 24, 1986 the Board on its own motion joined the Agency as a nominal party complainant consistent with 35 Ill. Adm. Code 103.121(c). Pursuant to that Order, on May 5, 1986, the Agency filed comments, including a statement of acceptance of the role the other parties have proposed it play in this proposed settlement, to which MCSL filed response comments of May 14.

The Complaint

All Counts except for Count V have been addressed by the parties in fairly summary fashion; Count V will therefore be discussed last.

Count I of the Complaint alleges failure to apply daily cover on 57 dates between 1974 and 1983; Count II alleges failure to apply intermediate cover on 48 dates between 1976 and 1980; and Count III alleges failure to apply final cover on 14 occasions between 1976 and 1980, all in violation of Section 21(d)(2) of the Environmental Protection Act and of applicable subsections of 35 Ill. Adm. 807.305.* Concerning these Counts, the stipulation recites that:

* The Complaint cites the pre-codified version of the Board's rules as found in old Chapters 7 and 9. This Order refers to the codified section numbers.

"Some of those temporary deficiencies resulted from inclement weather, while others were caused by difficult working conditions or by not having sufficient men and equipment on the site at all items. The number of operators and the equipment on site now are adequate to apply daily and intermediate cover as required and to properly maintain the final cover on those portions of the site which are already closed." (Stip. 7)

Count IV alleges failure to collect litter at the end of 22 working days between 1975 and 1983 in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.306. As to this Count, the stipulation notes that, although litter was blown away from the working face of the landfill, that litter was never observed by the Agency blowing off-site (Stip., 8).

Count VI alleges failure to spread and compact refuse on June 25, 1982 in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.303(b). Count VII alleges failure to deposit refuse at the toe of the fill on February 25, 1975 and March 27, 1979, in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.303(a). The stipulation states that MCSL does not believe that any specific changes in its operation are necessary, given that only three such incidents were reported in eleven years (Stip., 9).

Count VIII alleges failure "to otherwise comply" with permit conditions on 16 occasions between 1975 and 1983, in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.302. The parties agree that:

"These have each been corrected and were only part of the normal process of site development. For example, a portion of the site would be closed, the IEPA would observe that the slope on a side of the site was too steep and MCSL would correct it. No permit deficiencies exist today." (Stip., 11).

Count V alleges that MCSL caused or allowed the discharge of leachate into the environment so as to cause or tend to cause water pollution on 29 dates between 1978 and 1983, in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.313. The stipulation states:

"The IEPA inspection reports disclose observations of surface leachate. The leachate is described as seeps, flows and ponds. None of the leachate has ever been observed leaving the site. The leachate reported by the IEPA resulted either from erosion at areas of the site not completely vegetated or the fill settling in closed areas. Both of these problems will continue to occur sporadically until the site is entirely closed with final contours and

> complete vegetation in place. MCSL regularly inspects the site and performs remedial maintenance to correct these problems. Because of the drainage system engineered at the site such problems are contained and the leachate is channeled back into the fill. The relief agreed upon by the parties and described below is intended to insure that erosion and settling at the site are properly and finally resolved." (Stip., 10).

Based on this record, the Board finds that MCSL has violated the Act and Board regulations as charged. Given that MCSL had taken earlier steps to address its operating violations, and the agreed lack of adverse impact beyond the boundaries of the site, the Board agrees that imposition of a penalty at this time would not necessarily aid in the enforcement of the Act and Board regulations.

The Compliance Plan

In the Supplemental Stipulation, MCSL and LEAC explain that the "compliance program deals exclusively with the future", as LEAC "has no evidence that anything at the site needs to be 'fixed' to achieve compliance". The intent of these parties, given the fact that leachate seeps, flows, and ponds have in the past resulted from erosion or settling at already-closed areas of the site, "is an increase in the funds guaranteed to be available to repair erosion and settling that occur during closure and the years following closure." (Rev. Stip. p. 2,3).

The first condition of the compliance plan involves a $30,000 increase in the amount of the existing trust fund to $109,800, $79,800 being the amount required to satisfy the Board's regulations 35 Ill. Adm. Code 807.501 et seq. The second condition proposed is that:

> "regardless of the length of time covered by the Trust and required by the IEPA pursuant to the regulations of this Board for post-closure care, 3 years after the closure of the facility MCSL may withdraw all funds remaining in the trust account except for the sum of $10,000, or the then existing balance if less than $10,000 remains in the account, which shall remain for an additional 10 years (to the 13th year following closure), under the same terms and conditions as earlier applicable." (Stip. 13)

In response to queries by the Board, the parties to the stipulation indicated that the basis for the choices of the $30,000 amount and 10 year increase in the post-closure care were that each "had been selected by plaintiff and agreed to by Respondent" (Rev. Stip. p. 3-4). It is not the parties' intention that MCSL indefinitely maintain in its Trust Fund $30.000 in excess of the amount required by Board regulations;

the $30,000 is intended to be a one-time additional deposit (Id. p. 5). Similarly, the 10 year add-on to the existing 3 year regulatory post-closure care period is intended to be a one-time extension: that is, if Board regulations should in future be amended to require post-closure care period of greater than three years, the added time period would not extend MCSL's obligations pursuant to the stipulation, which would still end after the 13th year following closure (Id., p.6). Finally, it is the parties' intention that these additional funds in MCSL's Trust Fund should be disbursed as "specified by the IEPA...in writing" in the same manner as are any other funds in the Trust Fund.

The Agency's comments on the stipulation* are that it "agrees with and accepts the role that the parties have proposed for it". However, the Agency has concerns about the provision that provides for, at best, only an additional $10,000 figure for maintenance of the site for 10 years, and questions the sufficiency of $1,000 per year to assure adequate maintenance of a 40-acre site. The Agency additionally points out that ground-monitoring costs do not appear to have been considered in calculating the $1,000 yearly amount.

In response, MCSL essentially states only that if:

> "the proposed relief is inadequate then let us all agree to forget MCSL's offer to advance community interests by increasing the size of the fund and start from scratch. Anyone who wants can sue MCSL and see if they can justify imposition of any penalty at all. Or the Board can rely upon the Joint Stipulation and substitute some other penalty for that proposed -- and MCSL will appeal that penalty." (5-14-86 Comments, p. 3-4)

This proposed settlement and the comments made epitomize the dilemma the Board increasingly encounters in dealing with stipulations: the Board has a responsibility not to accept the parties' proposed orders simply on the rationale that "this is what we have agreed", but the record is more often than not insufficient for the Board to independently analyze those orders for appropriateness of the penalties/compliance plans. In this case, the Board continues to maintain its earlier reservations, now in part echoed by the Agency, concerning the efficacy of this

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* The Board notes the Agency's objection to its joinder as a complainant. The Board is at a loss to understand the nature of this objection, given that this action seeks to impose additional duties on Agency personnel for up to a 10 year period. The Board continues to believe it is procedurally preferable to prevent surprise to all concerned by presenting an opportunity for Agency comments-by-right prior to decision, rather than to issue a decision subject to a petition for leave to intervene and request to file comments in the event the Agency finds the order binding it and entered without its representation objectionable.

proposal. However, given that the "compliance program" is not designed to correct violations which the parties assert do not now exist, but is instead intended to ameliorate any which may occur in future, the Board will struggle no further. On balance, the Board feels the best course of action here is to accept the stipulation, as clarified, to accommodate the parties' desire to terminate this litigation. This acceptance is not to be construed as any comment upon, amendment to, or alteration of, the Board's financial assurance regulations, or as establishing any other precedent.

Finally, for the administrative convenience of all concerned, the Order as set forth below has been drafted to set forth in a unitary document, and in more specific language, the mechanics needed to implement the parties' intent as reflected in the original and supplemental stipulations. The Board believes this to be necessary, since it appears that MCSL, the Agency, and the Trustee must all execute an instrument modifying the existing Trust Agreement. (See Supp. Stip., Exh. A., Section 16-17.) In the event that the language of this Order inadvertently misconstrues or fails to fully capture the details of this plan as envisioned by the parties, the Board encourages submittal of substitute language by way of a motion for reconsideration.

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

ORDER

1. The Board finds that Respondent McHenry County Sanitary Landfill and Recycling Center, Inc. (MCSL) has violated Section 21(d)(2) of the Environmental Protection Act as well as 35 Ill. Adm. Code Sections 807.302, 807.303(a,b), 807.305(a,b,c), 807.306, and 807.313.

2. Respondent shall comply with the terms and provisions of the Joint Stipulation of Facts and Proposal for Relief, filed September 10, 1985 and the Supplemental Joint Stipulation of November 21, 1985, as more specifically articulated below:

a) Within 45 days of the date of this Order, Respondent shall deposit the amount of $30,000 into Trust Fund No. 23-30250, held pursuant to Trust Agreement by the Home State Bank of Crystal Lake, as Trustee, for MCSL, the Grantor. This $30,000 deposit is to be supplemental to the $79,800 required to be deposited in said Trust pursuant to the requirements of 35 Ill. Adm. Code 807.501 et seq., as established in Schedule A of the current Trust Agreement, which Agreement is incorporated by reference as if fully set forth herein.

b) In the event that the amount of closure and post-closure financial assurance that Respondent is required to provide pursuant to Illinois law and Board regulations may in future be increased to exceed $79,800, Respondent shall be authorized to

cause all or any remaining portion of this $30,000 to be obligated for satisfaction of the increased financial assurance requirement.

c) Respondent is ordered to cause any modifications to the Trust Agreement necessary to insure that the Trust Fund continues as long as any balance of this $30,000 remains in the Trust Fund unexpended or unobligated pursuant to subparagraph b) above, but in no event past the 13th year after closure, irrespective of any less stringent period required by Illinois law or Board regulations. This 13-year life provision shall not, however, supersede any more stringent requirements which may in the future be provided by law or regulation.

d) In the event that, three years after the close of the facility, more than $10,000 of the $30,000 remains unexpended, Respondent shall be authorized to withdraw any amounts in excess of $10,000. Any lesser amount shall remain in the Trust Fund.

e) In the event that, thirteen years after the close of the facility, any balance remains in the Trust Fund, Respondent shall be authorized to withdraw any such remaining balance.

f) During the life of the Trust, the Illinois Environmental Protection Agency (Agency) shall cause disbursement from the Trust Fund of all or any portion of this additional $30,000 consistent with the other parties' stipulation, Illinois law, and Board regulations. The Agency shall execute all written agreements necessary to amend the Trust Agreement consistent with the above Opinion and Order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 20th day of June, 1986, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board