ILLINOIS POLLUTION CONTROL BOARD
April 28, 1977

ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 74-471
WILFORD E. ("ERNIE") JOHNSON and NORMA I. JOHNSON, d/b/a BYRON SALVAGE,	)	
Respondents.	)	

Mr. Michael A. Benedetto, Jr., Assistant Attorney General, appeared for the Complainant;
Messrs. Sherwood L. Levin and Daniel L. Weisz, Attorneys, appeared for the Respondents.

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

The original Complaint in this matter was filed December 16, 1974, in which Complainant Environmental Protection Agency (Agency) alleged that Respondent Wilford E. Johnson, d/b/a Byron Salvage, had operated a refuse disposal site in Byron, Ogle County, in violation of various provisions of the Environmental Protection Act (Act) and this Board's Water Pollution Control Regulations. Respondent Norma I. Johnson was also alleged to have owned and controlled that site, although she was not charged with operation. The matter is presently before the Board on an Amended Complaint filed October 9, 1975, containing similar allegations.

The procedural history of the case is quite complicated and need not be entirely reiterated. In 13 Interim Orders* the Board has dismissed and reinstated the case, allowed the Agency to bring in additional Complainants who were later dismissed,** consolidated the case with a counterclaim, Johnson v. EPA, PCB 76-210, and later dismissed that case.

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* Interim Orders were entered on 7/10/75, 8/7/75, 9/4/75, 9/18/75, 10/16/75, 11/6/75, 11/26/75, 12/4/75, 3/11/76. 6/18/76, 9/30/76, 1/20/77, and 3/3/77. See also, Chairman Dumelle's Concurring Statement of 9/30/76.

** Respondents Julian Kullberg, d/b/a Roto-Rooter, Interstate Pollution Control, Inc., and Kullberg Enterprises, Inc., were dismissed 3/11/76.

At the time of hearing on February 17, 1976, at Oregon, Illinois, the Agency moved for dismissal of Counts III and IV of its Amended Complaint. With regard to the remaining Counts, I and II (Count V, never addressed, was later dismissed), the Agency and the Johnsons entered a Stipulation of Fact. Although no signed Stipulation was ever submitted to the Board, as required by the Procedural Rules, the Board now finds that it will waive that requirement in the interest of reaching an expeditious decision. We find the Stipulation of Fact acceptable and shall base this Opinion and Order on it.

We also note that the matters filed by the Attorney General on September 15, 1976, consisting of several in-depth reports on the site in question, performed by the Illinois State Geological Survey and the Agency, have not been made a part of the record. They are, however, responsive to the Board's Order of June 18, 1976, and were served upon Respondent who for over six months has failed to object to their filing or entry into the record. Although we do not rely on the use of those materials in reaching our decision on the alleged violations, we do find that their use is appropriate in determining the severity of violation and the absolute need for a remedy to protect the health, safety, and welfare of the public.

The Johnsons began operation of a scrap metal business, commonly known as "Byron Salvage," in 1964 or 1965. Mr. Johnson purchased ten acres of the site in question in 1968 or 1969, in joint tenancy with his wife. The remainder of the parcel upon which the operation was conducted is owned by a third party. Mr. Johnson also owns 50 acres northeast of the salvage yard, separated from it by a ravine, which is leased out and used for motocycle racing. As a result of an injury, Mr. Johnson ceased participation in the operation of the salvage business for the site in question in 1964; his two sons currently operate the business.

An Agency inspection on October 23, 1970, indicated that various 55-gallon and 10-gallon drums of chemicals were present -- uncovered -- on the site. Although the Agency knew, at least, that these barrels <u>might</u> contain sodium cyanide and other toxic hazardous substances, <u>it</u> nonetheless ordered those barrels buried, and the site covered in a manner consistent with the subsequently enacted Solid Waste Regulations. (Exhibits 4 - 20 to the Stipulation indicate that the Agency <u>probably</u> knew the hazardous nature of the contents of the barrels as early as 1970. The Agency certainly had knowledge of the situation no later than May 26, 1971.)

Respondent Johnson then proceeded to cover those barrels, and on August 11, 1972, the Agency advised him that the site had been "satisfactorily" covered.

On October 3, 1972, the Agency sent a telegram to Mr. Johnson, (Ex. 28), informing him that further investigations had indicated a serious water pollution problem resulting from the materials buried on the site.

Although we find that one of the alleged dates of violation for one of the cited pollutants is not proved by the exhibits to the Stipulation, (Ex. 2 does not show a copper concentration violation on October 2, 1972), the exhibits indeed show a multitude of violations over a long and continuous period. Exhibits 22 (9/29/72), 24 (10/2/72), 26 (10/3/72), 29 (10/4/72), 30 (10/5/72), 31 (10/6/72), 32 (10/10/72), 34 10/11/72), 36 (4/24/73), 37 (4/15/74), 38* (5/16/74), 39* (5/20/74), 43 (7/17/75), and ¶37 of the Stipulation (6/5/74, 5/26/75, and 6/16/75), are adequate to prove the allegations of Count II of the Amended Complaint. Count I, alleging the creation of a water pollution hazard, is shown more than adequately by the exhibits and the Stipulation.

The magnitude of these violations and the potential for future harm resulting from them is also shown by three reports, filed subsequent to the hearing, in accord with our Interim Order of June 18, 1976. The first of these, a "Report on Disposal of Toxic Wastes at Byron Salvage Yard," by the Agency's Division of Land/Noise Pollution Control Land Unit, concludes that:

> ...Data suggest that waste disposal at the yard is the major source of pollution. Concentrations of chemicals are high enough to cause lethal effects on human and animals... Percolation of the polluted surface water poses a serious threat to ground water in the area.

This report finds that the drums should be found and removed from the site, along with the soil already contaminated.

A second report, by the Illinois State Geological Survey, (August 27, 1976), prepared for the Agency, is titled, "Investigation of Hydrogeologic Conditions for Disposal of Toxic Industrial Wastes in Byron Area, Ogle County, Illinois." The Geological Survey's conclusions included:

> ...Geologic conditions at the Byron Salvage Yard are not suitable for the disposal of industrial wastes. ...Wastes buried in the southern and western part of the salvage yard could potentially cause extensive contamination of ground water.

The Survey's study goes on to point out that some ground water contamination is already detectable in wells and springs in the area.

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* These exhibits, consisting of 1 page each, are stated in the Stipulation to consist of 2 pages each.

Another Illinois State Geological Survey study, "Electrical Earth Resistivity Survey of Byron Salvage Yard Study Area," (Sept. 2, 1976), concluded that:

> ...[T]he measured electrical earth resistivity values changed across the study area...and the low values may indicate the presence of buried wastes or metal. The buried wastes appear to be concentrated in filled drainageways.

There is no dispute as to the existence of the alleged violations; however, the responsibility for the violations is strongly disputed by the Respondents. Briefly, Respondents claim that they did only what the Agency directed them to do, and that they are therefore relieved of any civil responsibility for those acts. The legal theories relied upon are those of estoppel and entrapment. (A previous Interim Order disposed of Respondents' claims of laches and statute of limitations.)

Turning first to the allegation of entrapment, Respondents admit that, "Criminal statutes may have no direct application to the instant case...," (Respondent's Brief, at 9). Respondents state that the defense is asserted for its "persuasive value," (id.). We find that there is indeed no direct application to the instant case, and find the defense to be without merit.

Respondents' Brief presents at length the application of the doctrine of equitable estoppel to governmental bodies generally, this Board specifically, and its predecessor, the Sanitary Water Board. See, e.g., Hickey v. Ill. Central R.R. Co., 35 Ill. 2d 427, 447-449 (1966); Wachta v. Pollution Control Board, 8 Ill.App. 3d 436 (1972); Frank v. Sanitary Water Board, 33 Ill.App. 2d 1 (1961). In summary, Respondent alleges that inasmuch as an Agency of the State of Illinois directed the burial of the barrels in question, the Agency is estopped from alleging, and this Board is estopped from finding, a violation with regard to the results of such burial.

There can be no question that the Agency's actions did contribute to the problem at hand. As noted in Respondents' Brief, it is indeed ironic that the Agency should prosecute after writing to Mr. Johnson, on August 11, 1972, (Ex. 21), that:

> The inspection disclosed that you have satisfactorily closed and covered your refuse disposal site. Your cooperation in this matter is appreciated. If the Agency can be of any assistance to you in the future, please contact us.

The next correspondence between the Agency and Mr. Johnson, as reflected in the record, was the telegram of October 3, 1972, cited above.

Despite the Agency's role in this unfortunate situation, estoppel will not lie. As the Agency points out in its Brief (even while admitting its role), estoppel is inappropriate where the health and safety of the public are at issue. Respondents' duty in this case, like the Agency's, was the protection of the health, safety, welfare, and environment of the people of the State of Illinois; the Agency's failure to properly prosecute and execute that duty cannot and does not excuse the Respondents. See, e.g., People ex. rel Brown v. Illinois State Troopers' Lodge No. 41, 286 N.E. 2d 524 (1972); People v. Larson, 308 N.E. 2d 148 (1974); Pacific Shrimp Co. v. Department of Transportation, 375 F. Supp. 1036 (1974).

Respondents operated the site; they owned a portion of the land in question; they were responsible for the placement of the barrels on the site; they actually caused the barrels to be covered. They are responsible and liable for the violations alleged.

In addition to the issues discussed above, we note that Respondent Wilford Johnson has been permanently disabled since 1974 and has not worked since then, and Respondent Norma I. Johnson, 52, is undergoing regular treatment for cancer and is confined to a wheelchair much of the time. The realty described above, consisting of the disposal site and 50 adjacent acres, is presently in foreclosure proceedings. Respondents have a considerable quantity of debt with no source of income or property. They are principally supported by a son attending school and working part-time thereafter. Neither has any accumulated savings.

All of these facts were apparent at the time of our June 18, 1976, Interim Order. As a result, we noted that in cases of this sort our "function goes beyond the mere imposition of liability...and includes finding with reasonable assurance that pollution problems such as those admitted to...will be abated."

Turning to the factors enumerated in §33(c) of the Act, we find nothing there to alter our decision as to the violations. The discussion above details at length the serious existing and potential interference with the "protection of the health, general welfare, and physical property of the people," likely to arise from Respondents' actions. As with the other factors under §33(c), Respondents introduced no evidence on this issue other than the minimal information contained in the Stipulation, as was their burden. Processing & Books, Inc., v. Pollution Control Board, 64 Ill. 2d 68, 351 N.E.2d 865 (1976).

The Fact Stipulation does indirectly address the issue of the social and economic value of the site when the parties note (¶39) that, "Proper disposal sites have been largely unavailable or relatively expensive." As we have often noted, any value that a site might have is negligible if the site is unsuitable and is improperly operated. That the site is unsuited is patent; that the site has been improperly operated is obvious in the results.

Priority in location is not an issue. The area is principally agricultural, and this improper use may render it unsuitable for that or any other use. Even if Respondents did have priority, that would not provide license for the actions taken here with regard to the improper burial of the barrels.

The parties stipulate (¶49) that it would have been technically feasible to properly dispose of the barrels. The question remaining is correcting the present situation. The barrels must be found and removed, along with the already-contaminated soil.

Although the Respondents did not enter any evidence as to the economic reasonableness of preventing this situation, it would seem that they could have simply refused to accept hazardous wastes. We are not provided with the income which such wastes provided for the Johnsons.

The economic reasonableness of remedying the problems already caused is another matter. The Stipulation specifically declined (¶50) to discuss the costs of removal. In fashioning our Order, however, we must balance this lack of information against the fact that something must be done to effectively remedy the existing and potential public health danger here.

Although we shall enter a cease and desist Order, we have no way of knowing the effect such an Order will have. With regard to the Johnson's property and any affected downstream areas, we can only hope that our Order will induce the State, or some successor to the Johnson's interest in the property, to take the necessary abatement measures. E.g., Lang v. Metzger, 101 Ill.App. 380, aff'd. 206 Ill. 475, 69 N.E. 493 (1902).

To that end, we shall continue in effect the provisions of the Interim Order of June 18, 1976, as they apply to the Johnsons. This will allow continued study and, hopefully, appropriate corrective measures such as excavation of the barrels and contaminated soil. The Agency's rights under that Order shall, of course, be subject to the limitations contained in our Interim Order.

Finally, we shall require the parties to this action, including Complainant, to report to the Board within 90 days of the date of our Order in this case as to the status of the site and any plans for further abatement. We can then, if necessary, request further action from any other appropriate Agency.

In light of the circumstances, no penalty is appropriate. We shall grant the Agency's Motion to Dismiss Counts III and IV, which concern adjacent property, inasmuch as that Motion is based on the fact that a third party is remedying the problems there.

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. With the exception of that portion of Count II, ¶11, alleging violation of the Water Quality Standards for copper in Rule 203(f) of Chapter 3: Water Pollution, on October 2, 1972, Respondents Wilford E. Johnson and Norma I. Johnson are found to have violated Sections 12(a) and 12(d) of the Environmental Protection Act and Rules 203(a) and 203(f) of Chapter 3: Water Pollution, (cyanide, cadmium, copper, iron, lead, manganese, nickel, silver, and zinc), on the dates and as alleged in Counts I and II of the Amended Complaint in this matter.

2. Respondents shall cease and desist the above violations by causing the removal of the barrels and contaminated soil in a safe, legal, and expeditious manner.

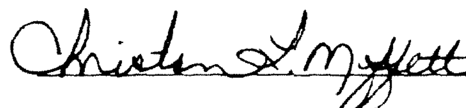
3. Respondents shall, for a period of ninety (90) days from the date of this Order, take such other actions as are necessary for continued compliance with paragraphs 1 and 2 of the Board's Interim Order in this matter entered on June 18, 1976.

4. The parties to this matter shall, within ninety (90) days after the entry of this Order, submit to the Pollution Control Board a report describing the status of the site in question, and further detailing any abatement activities which have been undertaken or are contemplated by the parties or any other person.

5. Counts III and IV of the Amended Complaint in this matter are dismissed.

Mr. James Young abstained.
Mr. Jacob D. Dumelle concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 28th day of April, 1977, by a vote of 4-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board