ILLINOIS POLLUTION CONTROL BOARD
July 8, 1976

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 75-262
SOIL ENRICHMENT MATERIALS CORPORATION, a Delaware corporation qualified to do business in Illinois; and ROCK ROAD CONSTRUCTION COMPANY, A Delaware corporation qualified to do business in Illinois, Respondents.	)	

Mr. Michael A. Benedetto, Jr., Assistant Attorney General, appeared on behalf of Complainant
Mr. Robert F. Ward, Chadwell, Kayser, Ruggles, McGee & Hastings, appeared on behalf of Respondent Soil Enrichment Materials Corporation

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

This matter comes before the Pollution Control Board (Board) upon the July 3, 1975 Complaint of the Environmental Protection Agency (Agency) charging the Respondents Soil Enrichment Materials Corporation (SEMCO) and Rock Road Construction Company (Rock Road) with violating Section 12(b) of the Environmental Protection Act (Act) and Rule 902 of the Board's Water Regulations. More specifically, the Agency alleges that on November 7, 1974, Respondents were issued a permit to remove sludge from Lagoon No. 8 of the Metropolitan Sanitary District of Greater Chicago (MSD) and to transport to and store said sludge in certain basins in Douglas County, the supernatant to be eventually applied to a tract of farmland known as the "Sourla tract." The Agency alleges that Respondents violated five Special Conditions to the permit in violation of Section 12(b) of the Act. Count II of the Complaint alleges that Respondents

operated between August 1, 1974 through November 6, 1974, without an Agency permit in violation of Rule 902(953) of the Water Regulations and Section 12(b) of the Act. At a hearing held May 18, 1976, a Stipulation of Fact was presented to the Board.

The parties stipulate that Respondents entered into a contract with the MSD to recover "liquid fertilizer" (hereinafter referred to as "sludge") from Lagoons 8 and 9 of the Calumet Sewage Treatment Works of the MSD on May 16, 1974. Performance was due by December 31, 1974 (Lagoon 8) and August 31, 1975 (Lagoon 9). Although SEMCO was to perform the work under said contract, Rock Road submitted the bid to the MSD. This was due to SEMCO's adverse financial condition which made it impossible for SEMCO to obtain a performance bond. SEMCO agreed with Rock Road that it would obtain the necessary permits or approvals from the Agency. Rock Road's contract with MSD included a clause requiring Rock Road to obtain "any and all permits" required by any governmental agencies. In addition, Rock Road agreed "...to remove, transport and dispose of in a lawful manner all liquid fertilizer called for by this Agreement..."

On June 4, 1974, Bauer Engineering, Inc., submitted, as SEMCO's agent, an application for a permit to excavate the sludge contained in Lagoon No. 8; load and transport the sludge to SEMCO's Arcola Regional Site; unload and store the sludge in the Storage Lagoons C and D at the Arcola site. The application, signed by representatives of both Respondents, stated that the applicants would conform with both standard and any special conditions made part of the permit. On August 3, 1974, SEMCO began removing and transporting the sludge. On August 26, 1974, the Agency denied the permit application. SEMCO replied to the Agency's Objections on September 16, 1974 but did not cease operations.

The Agency notified SEMCO of possible violations of the Act and the Board's Regulations on September 18, 1974. MSD, on September 24, 1974, requested SEMCO to, in effect, cease operation until permits were obtained. SEMCO discontinued operations until October 24, 1974. During that time the Agency and Respondents discussed resolution of the permit application. On October 25, 1974, SEMCO instituted a declaratory judgment action in the Law Division of the Circuit Court of Cook County, seeking a declaration of Respondents' rights to perform their contract obligations without an Agency permit. That cause was dismissed on December 20, 1974 by agreement and without prejudice.

On November 7, 1974, the Agency issued Respondents a permit for recovery of Lagoon No. 8 as per the permit application. That permit contained the following Special Conditions:

a. Required a $300,000 performance bond to be submitted no later than November 21, 1974 (Special Condition No. 2);

b. Required submittal of monthly operation reports (Special Condition No. 3);

c. Required installation and operation of instrumentation for the monitoring of meteorological conditions (Special Condition No. 4);

d. Required basins C and D to receive sludge only from MSDGC Lagoon 8 (Special Condition No. 6); and

e. Required removal of supernatant from basin D to the "Sourla tract" only after written permission from the Agency (Special Condition No. 7).

The Agency issued a Notice of Violation for failure to conform to Special Conditions 2 and 3 on February 11, 1975. SEMCO replied on February 25, 1975, that it had not accepted the permit and that it did not believe that a permit was required. On March 25, 1975, SEMCO filed another declaratory judgment action in the Circuit Court. The Agency filed this action with the Board and Respondents amended their Circuit Court Complaint, seeking an injunction to prevent Board action. The Circuit Court cause is currently pending.

The parties further stipulate to the following: (a) that at all times Respondents acted in good faith in applying for and eventually obtaining a permit; (b) that due to the nature of the contract, performance was required before the permit review process could have been completed; (c) that failure of Respondents to adhere to the conditions of the permit was not a deliberate attempt to disobey the law, but was due to a genuine dispute as to its validity; (d) that if the Board determines Respondents to be in violation of the permit condition, and if such a determination is affirmed if challenged, Respondents will comply with those conditions; (e) that failure to adhere to the permit's condition were mere technical violations and did not result in any actual pollution, though a pollution potential did exist; and (f) that any penalty imposed would further weaken SEMCO's ability to perform the contract and its financial condition.

The Agency request that, as it is statutorily prohibited from imposing, as a condition to a permit, the submission of a performance bond, that portion of the Complaint be dismissed without prejudice.

Respondents admit violating Special Conditions 3, 4, 6 and 7. They further admit that compliance was both technically feasible and economically reasonable. However, they do not admit violation of the Act or Board Regulations as they contend no permit was required and that therefore the permit was invalid.

The following issue is presented to the Board for resolution:

Whether the law is that one who removes, transports and stores digested sludge is required to obtain a permit under the Act and/or Board Regulations.

Complaint contends that former Rule 902 of Chapter 3 of the Board's Regulations (now Rule 953) required operating permits for "Treatment Works, Sewers and Waste Water Sources." "Treatment Works" is defined by Rule 104 to mean:

> ...[i]ndividually or collectively those constructions or devices...used for collecting, pumping, treating, or disposing of wastewaters or for the recovery of by-products from such wastewater.
>
> Wastewater is defined as:
>
> "...[s]ewage, industrial waste, or other waste, or any combination of these whether treated or untreated..."
>
> Sewage is defined as:
>
> "...[w]ater-carried human and related wastes from any source together with associated land runoff."

Complainant contends that sludge is treated sewage, and treated sewage constitutes wastewater by definition. As Respondent recovers the by-products from this treated wastewater, then Respondent must operate a treatment works. Complainant cites the case of May v. PCB, 35 Ill.App 3d 930(1976) which affirmed EPA v. Arnold May, et al., 12 PCB 321(1974) as dispositive.

Although May involved the application of sludge to property, the Board finds that it is at least analogous to the present cause. Here, Respondents' operation involves the recovery of a by-product and its transportation to another site where it is stored pending its eventual disposal as liquid fertilizer. May held that sludge is "clearly wastewater because it was treated sewage." (Slip Opinion at 8). The Board must conclude that as Respondents' operation is involved with both the eventual disposal of wastewater and the recovery of by-products from such wastewater, that operation constitutes a "treatment works." May held that if an operation is a treatment works, then "an operating permit is required for its use under Rule 902...and section 12(b) of the Act." (Slip Opinion at 4).

Respondent raises the same arguments that May did with regard to the Wastewater Land Treatment Site Regulation Act (Ill.Rev.Stat. Ch. 111 1/2 (581 et seq. (1973) and County of Grundy Illinois v. SEMCO, 9 Ill,App. 3d, 746, 292 NE2d 755 (3rd Dist. 1973). May rejected those contentions stating that Grundy is "no authority for the proposition that petitioner's activities were not subject to the permit requirements of the Act." That opinion also held that:

> Also, with respect to the Wastewater Land Treatment Site Regulation Act, we find that the fact that the Act recognizes a distinction between wastewater land treatment sites and digested sludge utilization sites (see, Ill.Rev.Stat. 1973, ch. 111 1/2, §582.04 and §582.06) and the fact that the Act requires a permit for the operation of both types of facilities does not aid petitioners in their argument. The fact that this Act may, in some respects, overlap the Pollution Control Board regulations does not necessitate the conclusion that prior to the Act the application of digested sludge to farmlands was unregulated by the Board. (Slip Opinion at 8).

The Board also rejects Respondents contention that the Agency proposal for "Liquid and Hazardous Waste Hauling Regulations" constitutes an admission that the transportation of sludge has not been previously regulated. The proposal of a regulation which may overlap other regulations does not mean that the overlapped portion was unregulated. As to Respondents contention that the proposed "Design Criteria for Municipal Sludge Utilization on Agricultural Land" constitutes further evidence of lack of regulation of their operations, we must disagree. That document consists of proposed criteria by which the Agency will judge whether a permit is required

for sludge application to land. It is issued to provide prospective permit applicants with knowledge of the standards the Agency will apply in determining whether an operation qualifies for the issuance of a permit. It is not a regulatory proposal (see Rule 931 of the Board's Water Regulations).

Respondents contend that because the Agency has not required a permit for MSD's Nu Earth Program the Agency action herein is arbitrary and standardless. However, even if the Nu Earth Program was not distinguishable from Respondents' operation, the mere fact that the Agency failed to enforce the permit requirement upon MSD would not be a defense to the instant action. If the conditions of the permit are unreasonable, Respondent may pursue an appeal of the permit or seek a variance from the requirements. Indeed, Respondent also has the option of proposing an amendment to the Board Regulations.

The Board concludes that Respondents' operation constitutes a wastewater treatment works under Board Regulations. Therefore, Respondent is required both by Rule 902 (953) and Section 12(b) of the Act to obtain an operating permit. In failing to conform to the conditions of the permit Respondents have violated section 12(b) of the Act. By operating without a permit between August 1, 1974 and November 6, 1974, Respondents have violated Rule 902 of the Water Regulations and Section 12(b) of the Act.

It is stipulated that Respondents have acted in good faith and that a genuine dispute as to the validity of the permit existed. Although Respondents admit that compliance was technically feasible, SEMCO's negative worth of 1.5 million dollars together with Respondents' good faith mitigates against assessing a penalty. Therefore, no penalty will be assessed for the violations found herein.

ORDER

It is the Order of the Board that:

1. Respondents are found to have violated Special Conditions 3, 4, 6 and 7 of its operating permit and Section 12(b) of the Act.

2. The allegation of violation of Special Condition 2 is dismissed.

3. Respondents are found to have operated without a permit from August 1, 1974 to November 6, 1974, in violation of Rule 902(953) and Section 12(b) of the Act.

Mr. Young abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 8th day of July, 1976 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board