

ILLINOIS POLLUTION CONTROL BOARD

March 21, 1974

ENVIRONMENTAL PROTECTION AGENCY,)
Complainant,)
)
)
v.) PCB 73-2
)
)
OSCAR E. DENNY, d/b/a D. and S. LANDFILL,)
Respondent.)

Thomas Cengel, attorney for Complainant.
Samuel Possin, attorney for Respondent.

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

The Environmental Protection Agency (EPA) filed its Complaint against the Respondent on January 2, 1973. An amended Complaint was filed March 26, 1973, and a second amended Complaint was filed January 8, 1974. The Respondent, Oscar E. Denny, operated a sanitary landfill until May 1, 1973, at the Northwest $\frac{1}{4}$ of Section 31, Township 1 North, Range 8 West in St. Clair County, Illinois.

The EPA alleged in its second amended Complaint that:

1. From December 2, 1971, until January 8, 1974 -- including certain specified dates -- Respondent caused or allowed open burning of refuse in violation of Section 9(c) of the Environmental Protection Act (Act) and Rules 3.05 and 5.12(d) of the Rules and Regulations for Refuse Disposal Sites and Facilities (Rules and Regulations).
2. From April 18, 1972, until May 1, 1973 -- including certain named dates -- Respondent caused or allowed open burning of refuse in disregard for Section 21(b) of the Act and Rule 3.04 of the Rules and Regulations.
3. From April 18, 1972, until May 1, 1973 -- including certain designated dates -- Respondent failed to confine the dumping of refuse to the smallest practical area and thus breached Rule 5.03 of the Rules and Regulations.
4. From April 18, 1972, until May 1, 1973 -- including certain identified dates -- Respondent failed to spread and compact refuse as rapidly as it was admitted to the site in violation of Rule 5.06 of the Rules and Regulations.

5. From September 29, 1971, until May 1, 1973 -- including certain specified dates -- Respondent failed to satisfy the six-inch daily cover requirement of Rule 5.07(a) of the Rules and Regulations.

6. From December 2, 1971, until January 8, 1974, -- including certain dates referred to -- Respondent deposited refuse in standing water in violation of Rule 5.12(c) of the Rules and Regulations.

7. From March 16, 1972, until May 1, 1973 -- including certain designated dates -- Respondent failed to carry out salvage operations in a sanitary manner and failed to remove salvaged materials daily, offending Rule 5.10(a) and (d) of the Rules and Regulations.

8. Within six months of the closing of its site, Respondent failed to apply a compacted layer of two feet of final cover as required by Rule 5.07(b) of the Rules and Regulations.

9. Respondent was the subject of a previous enforcement action, i.e. Environmental Protection Agency v. Oscar E. Denny d/b/a D. and S. Landfill #71-32; 2 PCB 331 (August 30, 1971). Respondent has failed to comply with various parts of Point 1 of the Order. Respondent has not ceased and desisted from open burning, has not carried out immediate refuse compaction, has not covered refuse daily, has failed to implement sanitary salvaging operations, and has deposited refuse into standing water.

The hearing took place on January 29, 1974, in Belleville, Illinois. Respondent only called one witness.

Respondent made an objection to testimony offered by witnesses who used notes to refresh their recollection before testifying. We uphold the Hearing Officer's ruling that the testimony was properly admissible. The rule is that a witness can use any object -- including a note -- to jog or refresh his memory in order to facilitate his own independent recollection of the events. In this case, the notes were used to revive memory; they were not used as a substitute for first-hand recollection.

The EPA's evidence established that Respondent Denny violated Section 9(c) of the Act; and Rules 5.06, 5.07(a), and 5.12(c) and (d). Respondent also violated the Board's Order of August 30, 1971.

Section 9(c) of the Act and Rule 5.12(d) were violated on two dates, June 2 and 5, 1972 (Comp. Ex. 5, Photographs A and B). Respondent's son, who ran the site when Oscar Denny was not available (R-194), also admitted that he was aware of the fires at the landfill (R-110).

Rule 5.06 (immediate refuse compaction) was violated by Respondent on numerous occasions over an extended period. Refuse was uncompacted from April 18, 1972, to April 26, 1972 (R-60; Comp. Ex. 4, Photographs A and B, G and H, and N, P, and Q). Refuse remained uncompressed from June 2 to June 5, 1972, (Comp. Ex. 5, Photographs C, D, E, F, G, and H). Some of the same refuse had not been condensed by July 13, 1972 (Comp. Ex. 7, Photograph G). Some of this refuse (Comp. Ex. 5, Photograph C and D) still remained uncompacted on April 9, 1973 (Comp. Ex. 3, Photograph I).

Rule 5.07(a) was repeatedly breached. Material uncovered on March 16, 1972 (R-50) was still visible on April 10, 1973 (Comp. Ex. 3, Photograph H). Other refuse, unconcealed on April 18, 1972, was still above ground on April 26, 1972 (Comp. Ex. 4, Photograph J, L, and M). Material seen on June 2, 1972, was still not buried on June 5, 1972 (Comp. Ex. 5, Photograph E, F, G, and H). Refuse observed on August 9 and 10 had still not been covered by October 4 and 5, 1972 (R-119, Comp. Ex. 8, Photographs E and F). Art Denny, son of Oscar Denny, admitted on February 21, 1973, that the operation was several weeks behind in covering the material brought onto the site (R-140).

Rule 5.12(c) was broken on August 10, 1972, when the EPA observed a truck dumping refuse into water ponded on the site (R-114).

Respondent violated the Board's cease and desist Order of August 30, 1971, in that subsequent to the Order open burning occurred at the site, refuse was not compacted as fast as admitted to the site, daily cover was not applied, and refuse was deposited into standing water.

We find that the EPA has not established violations of Section 21(b) of the Act, and Rules 3.04, 3.05, 5.03, 5.07(b), and 5.10(a) and (d) or that point of the Board's Order prohibiting scavenging. Section 21(b) of the Act is violated when open dumping occurs in contravention of the regulations. Although Rule 3.04 of the Rules and Regulations prohibits opening dumping, this Rule is not applicable if the facility is a sanitary landfill. Rule 5.11 permits open dumping for non-putrescible waste; therefore, no violation of 3.04 has occurred. Rule 3.05 prohibits open burning. Since we have already ruled that open burning occurred in violation of Rule 5.12(d), we hold that Rule 3.05 is not relevant to the sanitary landfill here in issue. Sufficient evidence was not introduced to establish a violation of 5.03. Although EPA introduced evidence of the areas of the landfill being used, failure to supply guidelines on the issue of practicability means that no violation has been proved. EPA characterized the collection of certain refuse as a salvage operation and alleged that Respondent did not carry out the operations in compliance with Rule 5.10(a) and (d). Respondent indicated that the material was not collected for salvage purposes and was, in fact, later buried (R225-6). The testimony

is in conflict; based on Respondent's statement that the material was put underground and not meant to be salvage, the evidence is insufficient to find a violation of Rule 5.10(a) and (d). Rule 5.07(b) is violated if final cover is not applied within 6 months of final placement of refuse. The landfill closed on May 1, 1973 (R-7). The six-month timetable of Rule 5.07(b) means that a violation could not have occurred until November 1, 1973. Rule 5.07(b) of the Rules and Regulations was superceded by Rule 3.05(c) of Chapter Seven: Solid Wastes on July 27, 1973. Therefore, no violation occurred of 5.07(b). Since Rule 3.05(c) of Chapter Seven was not mentioned in the Complaint, we cannot hold Respondent in violation of the final cover requirement.

Testimony offered by Respondent focused on mitigation. Respondent often had equipment troubles at the site (R-196, 240). Respondent Oscar Denny had a heart attack in December, 1971 (R-238) and has been under a doctor's care for several years (R-217). Oscar Denny is fifty-one years old and has distinct financial difficulties. No evidence was offered as to the fair market value of the landfill. Some evidence was offered that Oscar Denny owes his son, Art, \$65,000, as proper compensation for services performed at the landfill since 1968 (Comp. Ex. 10). Excluding the debt to the son and appraising the fair market value of the landfill at zero, Oscar Denny's assets are \$28,000 greater than his other liabilities.

It does not appear that Respondent's activity had a substantial impact on the environment. No garbage has been dumped at the site. There is no vermin problem at the site (R-217). There is no problem of leachate at the facility (R-94). Attempts have been made since May 1, 1973, to apply final cover but most refuse has not been covered (R-169).

Although Respondent's violations have been long-continuing, the fact that the landfill operation is now closed argues against a severe penalty. The main function of the Board is to achieve compliance with the Act and Rules; the Board's penalty powers only serve as a means to this end. In its closing argument, EPA prayed for the imposition of a penalty. Then it stated (R-259):

"The more important question is the question of what is to happen to the site. It was closed May 1, 1973. . . . we ask that the Board require that Respondent Oscar Denny completely cover that site with at least two feet of cover material within sixty days after the issuance of the Board's order."

We agree with this approach suggested by EPA. Based on the facts and circumstances of this case, a severe penalty would not be appropriate. This constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Respondent apply two feet of final cover material on those portions of the landfill not already overspread with final cover. Final cover activities must be completed within 120 days of the adoption of this Order. Within 30 days of the adoption of this Order, Respondent must post a performance bond of \$5,000, in a form satisfactory to EPA, to assure compliance with this final cover Order.

2. Respondent pay a penalty of \$200 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 must be tendered by Respondent within 35 days of the adoption of this Order.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of March, 1974, by a vote of 5 to 0.


Christan L. Moffett, Clerk