ILLINOIS POLLUTION CONTROL BOARD
August 15, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Complainant,

v.

TOP CHOP, INC., an Illinois Corporation,
Respondent.

PCB 83-28

JAMES L. MORGAN, ASSISTANT ATTORNEY GENERAL, APPEARED FOR COMPLAINANT.

BERNARD CONRADY, ROSS GATES, MARVIN CONRADY, WAYNE OVERBEY, AND NOEL HICKS, PRO SE, APPEARED FOR RESPONDENT.

ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a March 1, 1983, complaint filed by the Environmental Protection Agency ("Agency") against Top Chop, Inc., ("Top Chop"). The complaint charges that during 1982 and 1983 certain operations and discharges from Top Chop's hog lot facility ("facility") in Palmira, Macoupin County, Illinois were in violation of various Board regulations and Sections of the Environmental Protection Act ("Act"), respecting water pollution and livestock waste control.

A hearing was held on April 22, 1983, which no members of the public attended. At hearing the parties filed a Stipulation and Proposal for Settlement. That Stipulation called for a civil penalty of $1,500. On June 2, 1983, the Board issued an Opinion and Order accepting the stipulated settlement providing the parties would agree to modification of the penalty figure from $1,500 to $5,000. The Order provided that Top Chop was to certify its acceptance of the modification in writing within 30 days or "the Stipulation and Proposal for Settlement [would] be rejected in toto by the Board and the case [would] be remanded to the parties for appropriate action" (Opinion, p. 4). No written certification of acceptance of the $5,000 penalty was filed.

On June 30, 1983, Top Chop submitted a letter to the Board containing information relating to its financial condition. The Agency moved that the letter be stricken and the Board granted the Agency's motion in a July 26, 1983, Order. On October 24, 1983, Top Chop filed what it called a "resolution for Reconsideration and Modification of the Order of the Board" which

requested the Board to reconsider its rejection of the $1,500 penalty. On November 16, 1983, the Agency filed a response requesting that the motion be stricken. On November 18, 1983, the Board granted the Agency's motion to strike, rejected the Stipulation and Proposal for Settlement of April 28, 1983, *in toto*, and remanded the matter to the parties for further action.

On January 18, 1984, another hearing was held. The Agency read a new Stipulation and Proposal for Settlement into the record. This new settlement proposal was essentially an updated version of the original settlement. The background facts were recited, the Respondent admitted the alleged violations, and a compliance plan was set forth (R 1/18, pp. 6-16). However, in the second settlement agreement, the amount of the civil penalty was left open for Board determination. Each party presented testimony and exhibits concerning the nature of the claimed violations, an appropriate penalty, and Respondent presented evidence on mitigating factors and its precarious financial position. Although the new Proposal for Settlement was read into the record, no *signed* copy of the document has ever been submitted to the Board. On December 6, 1984, the Board ordered the parties to file a *signed* copy of any Stipulation and Proposal for Settlement. On January 31, 1985, and March 14, 1985, the Agency informed the Board by letters of continuing efforts to secure a signed Stipulation. On May 30, 1985, the Board ordered the parties to file within 30 days either a signed stipulation or "a status report informing the Board of any impediments they perceive to a final disposition of this case on the existing record." On June 28, 1985, the Agency filed a status report indicating the Board should receive a signed stipulation by July 22, 1985. The status report stated that if the Board did not receive the status report, "the Agency would have no objection to resolution of this case upon the present record."

No signed Stipulation and Proposal for Settlement was ever received by the Board. The Board will proceed to adjudicate this controversy based on the present record, as invited by the Agency in its letter of August 7, 1985. However, since no signed Stipulation was filed, the Board must base its decision on facts presented at hearing rather than statements in the Stipulation.

The Agency presented one witness at hearing, their field inspector, Mr. Ross Manning. Mr. Manning testified that during a field inspection March 29, 1982, he observed the waste lagoon to be full and overflowing to the draw and creek, that the discharge continued during his inspection until he requested an employee to raise the lagoon elbow pipe, and that the draw and creek were septic and discolored. Mr. Manning testified that he again visited the facility on May 13, observed a discharge to the creek on that date, and observed pockets of liquid waste and dry manure in the draw beneath the waste lagoon. On that date, he observed that Goose Creek upstream of the discharge was clear and normal but at the point of discharge and downstream the creek was black and septic. On November 8, Mr. Manning visited the site

and found the lagoon to have about 12 inches of freeboard, bringing the level of liquid up to the level of the discharge pipe. Mr. Manning visited the site one more time after November 8, and he observed the lagoon to be full, and indications of a recent discharge from the lagoon. Based on his observations, Mr. Manning concluded that the lagoon did not contain adequate freeboard to handle any precipitation event (R. 1/18, pp. 18-31).

Mr. Manning also prepared a calculation of the amount of waste which would be generated at the facility and the cost of removing such wastes from the facility (Hearing 1/18, Pet. Ex. 1; R 1/18, pp. 34-37). However, the record does not have any showing regarding the amount of waste that may have been discharged to receiving waters and; therefore, cannot be used in any calculation of revenues saved by non-compliance. Neither does the record reflect any estimates of actual waste removed so that the Board might estimate total wastes improperly disposed. Respondent's Exhibit #2 and #7, indicates that Top Chop has taken some measures to remove waste (See also Record 1/18, p. 76). Consequently, the Board is left with inadequate information to draw any conclusions regarding the amount of wastes discharged or cost savings.

Evidence presented by Top Chop focused on two points: the difficulty of waste management during the times in question due to high rainfall and the precarious financial position of Top Chop. The waste management difficulty resulted from rainfall about twice the annual amount (R 1/18, p. 51).

Top Chop was incorporated in 1977 with an original investment by the incorporators of approximately $250,000. Gross income from 1977 to 1982 increased from $404 to $384,591. However, net taxable income during that period ranged from a loss of $802 to a loss of $93,019; each year reflected a net taxable income loss. Total losses for the six-year period are $395,352. Additionally, Top Chop's lending institution has established that maximum total debt shall not exceed 60% of the totals assets (R 1/18, pp. 54-68).

In essence, the Board is presented with a corporation in extremely precarious financial condition.

Perhaps the most disturbing aspect of the entire cases is the following exchange, in which the Agency Attorney was cross-examining Mr. Obery of Top Chop:

> Q (By Mr. Morgan) I'll rephrase my question. The people that are shareholders in Top Chop are also shareholders in Tasty Lean, aren't they?
>
> A Not 100 percent.

Q There are some shareholders in both corporations that are the same?

A Yes, sir.

Q In your discussions with [Agency Inspector] Ross Manning regarding Tasty Lean and Top Chop, it is possible that one facility will be discussed when another is being inspected; isn't that correct?

A Yes, sir.

Q Do you recall telling Ross Manning during the inspection of Tasty Lean that the owners knew they violated the E.P.A. regulations when they deliberately pumped waste effluent to Top Chop/

A Yes, sir.

Q You did make that statement?

A Yes sir. We were --

Q Wait a minute.

A -- anticipating going through this filtration. (R 1/18, pp. 48-49)

While the Board would be especially concerned with a situation where one corporation was being operated at a loss so that another corporation with common stockholders could operate at a profit due to reduced costs of waste transfer, the case here does not prove that situation. There was no allegation or proof that the transfer of waste from Tasty Lean to Top Chop was anything other than a normal business transaction for which normal business fees were charged.

Based on the evidence presented the Board finds that Top Chop caused or allowed the discharge of hog wastes from their waste lagoon to the draw and Goose Creek on March 29, 1982; May 13, 1982 and just prior to the Agency inspection in November of 1982. Further, the Board finds that those discharges resulted in deposits of hog manure in the draw and a black and septic condition in Goose Creek. The Board also finds that the waste lagoon had inadequate storage capacity to prevent overflows.

After evaluating the factors listed in Section 33(c) of the Act, the Board finds that the discharges from Top Chop have had an adverse impact on the general welfare of the people in that the quality of Goose Creek was degraded and rendered septic. The Board finds that Top Chop is of social and economic value. The Board finds that Top Chop is suitable to the area in which it is

located if it does not cause discharges from its waste lagoon. The Board was not presented with a priority of location issue in this proceeding.

When the figures in the Agency exhibit on waste disposal (Pet. Ex. 4) are adjusted to reflect the correct number of hogs (R 1/18, p. 33), it is clear that 1982 waste disposal costs by contract hauling would be less than $7,500 for all wastes. Actual waste disposal costs would be less since much of the waste could be applied to farmland with Top Chop's equipment. Thus, the Board finds that proper waste disposal was technically feasible and (for a business with a 1982 gross income of $384,591) economically reasonable.

FINDINGS OF VIOLATION

Count I of the Agency's complaint claims violations of the Act and regulations relating to discharges without an NPDES permit. As no information was introduced at hearing regarding whether Top Chop had an NPDES permit, Count I must be dismissed. Counts III and IV of the Agency's complaint claim violations of numerical water quality standards for Ammonia Nitrogen and Dissolved Oxygen resulting from Top Chop's discharges. As no information regarding numerical water quality values was introduced Counts III and IV must be dismissed also.

Count II of the Agency complaint claims that Top Chop's discharges have caused water pollution in violation of the Act and Board Regulations, which provide:

> Section 12(a) of the Act provided:
>
> "No person shall:
>
> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act."
>
> Section 304.105 of Subtitle C of Title 35, Chapter 1 provides in pertinent part:
>
> "In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard...."

Section 302.203 provides:

> "Waters of the State shall be free from unnatural sludge or bottom deposits, floating debris, visible oil, odor, unnatural plant or algal growth, unnatural color or turbidity, or matter of other than natural origin in concentrations or combinations toxic or harmful to human, animal, plant or aquatic life."

The Board holds that Top Chop has violated 35 Ill. Adm. code 304.105 and Section 12(a) of the Environmental Protection Act.

Count V of the Agency complaint claims that Top Chop has violated Rule 104(d)(3)(c) and Rule 104(d)(3)(D)(ii) of Chapter 5 "Livestock Waste Regulations" of the Pollution Control Board Rules and Regulations, which provide in pertinent part:

> Chapter 5 of the Illinois Pollution Control Board's Rules and Regulations, Rule 104(d)(3)(C)) provides:
>
> "The contents of livestock waste-handling facilities shall be kept at levels such that there is adequate storage capacity so that an overflow does not occur except in the case of precipitation in excess of a 25-year 24-hour storm."
>
> Rule 104(d)(3)(D)(ii) of Chapter 5 provides:
>
> "New livestock waste-handling facilities which handle the waste in a liquid form shall provide a minimum of 120-day storage with a liquid manure-holding tank, lagoon, holding pond, or any combination thereof unless the operator has justifiable reasons substantiating that a lesser storage volume is adequate. If inadequate storage volumes cause or threaten to cause a violation of the Act or applicable regulations, the Agency may require corrective measures."

The Board holds that Top Chop did violate Rule 104(d)(3)(C) based on the Agency testimony that the lagoon had inadequate capacity for any precipitation event. However, as the Agency did not introduce evidence on the size of the lagoon, the Board holds that Top Chop did not violate Rule 104(d)(3)(D)(ii).

CIVIL PENALTY

The Board finds that a civil penalty of $3,500.00 is appropriate for the facts and circumstances of this case.

This opinion constitutes the Board's findings of fact and conclusions of law in this proceeding.

ORDER

1. The Board finds that Top Chop has violated 35 Ill. Adm. Code Section 304.105, Section 12(a) of the Environmental Protection Act, and Chapter 5, Pollution Control Board Rules and Regulations, Rule 104(d)(3)(C).

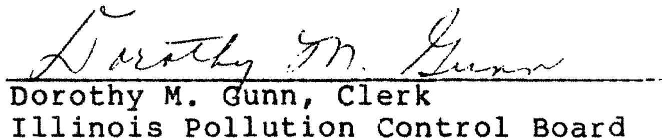
2. Within 90 days of the date of this Order, Top Chop shall pay a civil penalty of $3,500.00. Such sum shall be payable to the Environmental Protection Trust Fund.

3. Top Chop shall cease and desist from all discharges from their hog waste lagoon, except as such discharges may be authorized by a valid NPDES permit.

IT IS SO ORDERED

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 15th day of August, 1985, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board