



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of a Petition for a Review of
Violations by Mar-Oco Landfill and Review of the
License and/or Permit Issued to the Mar-Oco
Landfill, Landfill License #3095

Case No. IH-11-06

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Green Bay, Wisconsin on November 14 and 15, 2012, Jeffrey D. Boldt, administrative law judge presiding. The parties requested an opportunity to file written briefs and the last was received and the record closed on January 7, 2013. This decision is accordingly timely within the 60 day requirement of Wis. Stat. § 289.92(2)(a).

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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DNR
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Madison, WI 53707-7921

Charlie and Colleen De Smidt and Other Petitioners, by

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Mar-Oco Landfill, by

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FINDINGS OF FACT

1. On June 30, 2011, the Department of Natural Resources (Department or DNR) received a Petition for Enforcement Against Mar-Oco Landfill (Mar-Oco or the Landfill) from Attorney Jodi L. Arndt on behalf of Charlie and Colleen De Smidt. In addition to the De Smidts, the Petition was signed by thirty-seven neighbors and residents.

2. The Petition alleged that Mar-Oco Landfill which is owned and operated by Marinette and Oconto Counties had not been operating its facility in compliance with the State of Wisconsin's rules and regulations pertaining to landfills.

3. On July 28, 2011, the Division of Hearings and Appeals (Division) received a Request for Hearing from the Department.

4. Petitioners Charles and Colleen De Smidt own multiple land parcels, which make up a subdivision known as Fairway Estates, located along De Smidt's Golf Course. The De Smidts have resided adjacent to the Landfill since the 1980s. The other Petitioners live within a mile or so of the Landfill, frequent the De Smidt's Golf Course and/or are users of the Landfill.

5. The Landfill is located at N7785 Shaffer Road, immediately adjacent to and bordering the north side of Fairway Estates in Crivitz, Wisconsin. The Landfill currently occupies approximately eighteen (18) acres located in the NW ¼ of NE ¼ of Section 23, T32, R19E, N7785 Shaffer Road, Stephenson, Town of Marinette County, in the State of Wisconsin. (Ex. 202-203) Marinette and Oconto Counties share joint ownership and of the Landfill and Marinette County employees operate it. (Ex. 200; Lefebvre) The original lifespan of the Landfill was projected to be sixteen (16) years. The Landfill believes it has another twenty (20) or more years before it will reach its full capacity.

6. At the hearing, Petitioners withdrew their allegations relating to the operation of the gas extraction system. (Petition Nos. 3, 7, 8) Further, in their closing argument the petitioners do not allege a violation of the specific regulations regarding dust (Petition No. 10) or odor (Petition Nos. 2, 9). In addition, Petitioners did not allege in their Petition that the Landfill failed to take effective means to control birds and therefore violated Wis. Admin. Code § NR 506.07(1)(f). (Petitioners Closing, at 8, 16) To the extent that the failure to take effective means to control birds is alleged as a separate violation (as opposed to using it to provide evidence of a failure to apply adequate daily cover), this violation is dismissed.

Accordingly, the only remaining allegations relate to:

- Daily cover, § 3.7.2.2. of the Plan of Operation
- Intermediate cover § 3.6.1 of the Plan of Operation
- Windblown debris § 3.7.3.3. of the Plan of Operation

- Screening § 3.2.4 of the Plan of Operation

7. Section 3.7.2.2. of the Plan of Operation requires six inches of cover material at the end of each working day:

The operator shall be responsible to see that all wastes are unloaded in the designated locations at the working face. . . Systematically placing loads in a small unloading area reduces work, encourages better compaction, and minimizes scattering of wastes....

Refuse shall be unloaded at the bottom of the advancing lift where practical and spread upslope on a 3:1 slope to achieve acceptable compaction. Wastes should be spread and compacted immediately after unloading to reduce blowing litter and keep the unloading area clear for additional loads. Compaction is to generally be carried out by spreading the wastes in one to two foot thick layers. A minimum of two passes of the equipment over the entire layer is suggested for satisfactory compaction . . . Individual layers of compacted wastes should be built up during the day to create a daily cell with a maximum depth of 10 to 15 feet. The actual width and length will vary in proportion to the amount of refuse received.

At the end of each working day, a compacted layer of six inches of daily cover material shall be placed on all exposed refuse. The daily cover soil is to be obtained from excavation of future fill areas or stockpiles. Ex. 102, 47-48 (emphasis added); see also Zellmer D.T., at 6.

8. Section 3.6.1 of the Plan of Operation provides:

Filling Sequence 1 shall be completed when intermediate grades, as shown on Drawing No. MI8102A-9, have been reached. *One foot of intermediate cover is to be placed, as soon as practical, on intermediate grades and vegetated to promote evapotranspiration.* Cover soils shall be obtained from stockpiles or the sequential excavation of Phase II. Estimated construction quantities for Filling Sequence 1 are shown on Drawing No. MI8102A-4 Ex. 102, 42 (emphasis added).

9. Section 3.7.3.3. of the Plan of Operation contained provisions for litter control:

One of the most important aspects of periodic landfill maintenance is litter control. Blowing litter can be minimized by:

- a. Maintaining a small working face.
- b. Covering portions of the cell as they are constructed.
- c. Taking advantage of prevailing wind direction and orienting daily landfill operations accordingly.

Temporary fences and portable wind screens can be positioned around the working face to intercept blowing paper and plastic. Personnel should clean up litter on an as needed basis. Ex. 102, 51; see also Zellmer D.T., at 6

10. Section 3.7.3.5. of the Plan of Operation pertains to site appearance:

. . . . Overall site appearance is a public acceptance factor and can be strongly affected by the presence of windblown debris. For that reason, litter is to be collected from the perimeter of the site, along with the entrance roads, from fences, and within the landfill itself on an as needed basis. The active working face should be kept as small as possible. Lighter waste materials should be covered by heavier refuse as soon as possible to minimize blowing problems Ex. 102, 52 see also Zellmer D.T. at 6-7.

11. Section 3.2.4 of the Plan of Operation does not require screening or fencing on the south boundary of the Landfill property:

Due to natural screening, no major construction activities are needed to screen operations from public view.

Fencing and a gate shall be provided as shown on Drawing No. MI8102A-3. It is proposed that no additional fencing be provided due to the remote location and natural screening surrounding the site. Ex. 102, 33; see also Zellmer DT, at 8-9.

12. Periodically, prior to 2010, the Petitioners noted odors and fumes originating from the Landfill. On several occasions, Mr. De Smidt complained to John Lefebvre, the Landfill's director of operations, and those calls typically resulted in the smell being alleviated shortly thereafter. A DNR compliance monitoring form dated March 20, 2009, noted a violation with respect to the Landfill's efforts to collect windblown debris, which included "a significant amount of windblown litter beyond the lined area of the landfill." (Ex. 49)

13. The DNR received approximately twelve complaints about the Landfill during the period of July 19 to October 10, 2010. All of these complaints related to concerns about putrid odors and a lack of appropriate cover on the Landfill. Ten complaints occurred during the period of July 19 to July 27, 2010. (See: Ex. 106)

14. In part because of these complaints, the DNR conducted compliance inspections in May, September and November of 2010. (James Zellmer Direct Testimony (D.T.), p. 6)

15. The DNR received one complaint about the Landfill in 2011, and one in 2012. (Zellmer D.T., p. 15)

16. The DNR found the Landfill not to be in compliance for litter collection and intermediate cover on May 6, 2010. (Ex. 112) The lack of intermediate cover included a large area in Phase II, Increment A. Mr. Zellmer documented both violations with photographs. (Id. p. 6-7) With respect to litter collection, the report noted: “It doesn’t appear that the site operator is able to keep up with windblown litter collection.”

17. The September 7, 2010, DNR inspection did not find the Landfill to be out of compliance with permit requirements.

18. A November 4, 2010, DNR inspection found the Landfill to be out of compliance with daily and intermediate cover requirements. Further, the report noted “compliance with concern” as it related to windblown debris and a reminder that “windblown litter needs to be collected on a daily basis.” (Ex. 115)

19. Mr. Zellmer testified that the Landfill was back in compliance during inspections conducted in May and November of 2011. (Zellmer D.T., p. 19)

20. The Landfill was once again out of compliance in May of 2012, in part due to problems it was having with its waste compactor. (Zellmer D.T., p. 20) Exhibit 111 documents the resulting failure to apply sufficient daily cover to exposed areas, and “wind blown debris outside of the landfill limits, including on the De Smidts property.” While the problems with the trash compactor were in part outside the direct control of the Landfill operator, such problems do occur and reinforce the need for a more pro-active approach to containing windblown debris, including more redundant fencing and more staff devoted to litter collection. Further, the Landfill should have a better back up plan in place to deal with equipment problems and maintenance.

21. The Landfill was back in compliance at the time of the most recent inspection in October, 2012. (Zellmer, D.T., p. 21)

22. The problem of windblown debris, particularly plastic bags, is a common issue during windy periods and also after the spring snow melt. (Zellmer, D.T., p. 25) However, other landfills have done a far better job than Mar-Oco in managing windblown debris, including hiring part-time personnel to collect it on a daily basis. (Zellmer; Killian) Mr. Zellmer noted that other landfills have installed more redundant fencing or employed part time employees solely dedicated to litter collection. The current primary Landfill operator, Mr. Del Santo, has numerous other responsibilities that make it difficult for him to put the time into collecting litter that the problem requires.

The Petitioners have established by a clear preponderance of the credible evidence that the Landfill has repeatedly disregarded its permit requirement to collect windblown debris on a daily or even on an ‘as needed’ basis. The Plan of Operation specifically states: “Every effort shall be made to minimize the effect that windy conditions can have on the landfill.” The Landfill has fallen far short of this obligation.

23. With respect to the daily cover requirements, the Petitioners consultant, Paul Killian of RGEI, concluded in a July, 2012, report that “photographs and Inspection Forms indicate areas of exposed waste left uncovered for extended periods of time. It is our opinion the exposed waste directly results in nuisance odors and the presence of windblown material which impacts the quality of life in the surrounding community. The pattern of poor operating practices followed by WDNR Inspection Reports and subsequent improvements in site conditions suggests that if the WDNR was not regularly conducting site evaluations, there would be no improvement in site operations.” (Ex. 25, p. 5)

24. The Landfill was cited three times for failure to apply sufficient intermediate cover during the period of July to November, 2010. (Zellmer, D.T., pp. 25-26) These actions were related to failure to provide intermediate cover on areas of Phase II, Increment A of the Landfill, particularly to south and west side slope. Final cover was finally constructed over this area during the summer of 2012.

25. Mr. Zellmer testified that the Department has not cited the Landfill for any specific violations with respect to a lack of proper screening during the period of 2010 to the present. (Zellmer, D.T., p. 29) The Landfill has recently taken down some trees in connection with a new phase of construction. However, the Landfill continues to meet the minimum code requirement by maintaining approximately 50 feet of forested land on its southern border and several hundred feet on its eastern border. (Id., pp. 30-31) The petitioners have not demonstrated a violation of code or statutory requirements with respect to screening.

26. The report filed by the Petitioners’ experts accurately identified a disturbing pattern of the Landfill doing the minimum, resulting in numerous citations by the DNR, and then remedial action being taken by the Landfill to finally bring it into compliance. (Killian; Ex. 25, pp. 4-5) There has been a long history of non-compliance by the Landfill, dating back to 1988. (Killian) The DNR inspections have repeatedly noted concerns and issues with the Landfill’s lack of adequate daily cover, problems with windblown materials and failure to apply intermediate cover. (See Exs. 38-43, 47-50)

27. Based upon a preponderance of the credible evidence, given the repeated violations of Wis. Admin. Code NR 506.07(1) by the Landfill that the Department impose more specific permit requirements relating to the collection of windblown debris.

The Department should consider, but not be limited by, the following options:

- Install additional higher and or redundant fencing within the Landfill perimeter;
- Requiring the employment of part-time personnel solely dedicated to picking up windblown debris;
- Increased inspections, on up to a quarterly basis, for a period of no less than two years to ensure compliance.

28. The numerous violations of the daily and/or intermediate cover also strongly support the need for increased regular inspections of the Landfill by the Department. Given the history of violations followed by remedial actions, it may well save DNR personnel time to inspect the facility and ensure that the Landfill is taking its code and permit requirements seriously.

DISCUSSION

On July 17, 2010, the De Smidt's hosted an open house relating to their proposed new residential subdivision, Fairway Estates. The group included more than fifty potential contractors, builders, and construction industry representatives interested in purchasing and/or developing homes in Fairway Estates. The timing was very poor with respect to the conditions at the Landfill. The heat and humidity, as well the prevailing winds, led to an offensive odor and blowing trash permeating the open house, and interest in the new subdivision was seriously harmed.

Landfills are by their very nature dirty, smelly neighbors. However, the Petitioners have a right to expect that the Landfill will follow all relevant Wisconsin Statutes and Administrative Code provisions without repeated violations and without being repeatedly ordered to comply by the DNR. The Landfill has failed to do so as it relates to both addressing problems with windblown debris and maintaining daily cover over disturbed areas.

Both the Landfill manager, Mr. Lefebvre, and the on-site operator, Mr. Del Santo, appeared to be highly motivated and extremely competent County employees. However, their good-faith and successful efforts to deliver low-cost services to the two counties appear to have led to some short-cuts and patterns which have contributed to the repeated violations. Mr. Lefebvre's own testimony indicated a concerning pattern of ignoring permit and code requirements that he considered unreasonable.

This pattern was especially demonstrated with respect to the ongoing failure of Mar-Oco to follow § NR 506.07(1)(c), which requires that "at the conclusions of each (emphasis added) day of operation, all windblown material shall be collected and properly disposed of in the active area" While the code does allow for some exceptions "because of conditions beyond the control of the operator" no such conditions were demonstrated by the Landfill. With respect to litter collection, the DNR report relating to the site violations in May, 2010 noted: "It doesn't appear that the site operator is able to keep up with windblown litter collection." This problem has not been satisfactorily resolved in the ensuing years. Rather, both Lefebvre and Del Santo admitted that such collection was only undertaken as time allowed. That's not been enough, and the DNR must consider new permit requirements including redundant fencing, additional screening and/or hiring part-time personnel to collect windblown waste every day as the code requires. It's time for the Landfill and the DNR to work together to develop an effective pro-active strategy of containing windblown debris and resolve the ongoing problems.

The other violations established by the petitioners, relating to meeting daily and intermediate cover requirements appear to have improved since 2010. It is hoped that the Department will conduct regular and aggressive additional inspections over the next two years to ensure that these problems are now behind the Landfill. It is also hoped that the Landfill will better plan for equipment maintenance and outages. The authority of the Division to order the Department to make the changes below is something of a muddle. While the unappealed final decision of the Division is the DNR's final legal decision, the statute does not provide a specific authority for the Division to order the suggested permit amendments. Accordingly, the Orders below, while necessary to effectuate the purposes of Wis. Stat. § 289.92, are offered as suggestions rather than commands to the Department. All parties would benefit from a reduction of complaints, better planning, and more complete compliance with legal requirements.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in cases relating to a review of alleged violations filed by any six or more citizens or any municipality who petition for a review of an alleged violation of this chapter or any rule promulgated or special order, plan approval, license or any term or condition of a license is under chapter 289 pursuant to Wis. Stat. § 227.43.

2. Wis. Admin. Code NR 506.06 provides:

Intermediate cover. Unless otherwise approved by the department in writing, any portion of a landfill which has been used for solid waste disposal but will not receive additional solid waste for a period exceeding 6 months shall be covered with one foot of fine grained intermediate cover or other material approved by the department. A specific soil type may be specified by the department for this one foot layer. The intermediate cover shall be compacted and adequately sloped to allow storm water runoff. The slopes shall be no less than 5% and no greater than 33%. The department may require that intermediate slopes be vegetated depending on the length of time they will remain open. This section does not apply to high volume industrial waste nor does it apply to wood residue approved as a construction material or to provide protection of the liner from frost under s. NR 506.07(3)(b), unless specifically required by the department.

The Petitioners established multiple violations of this code requirement.

3. Wis. Admin. Code NR 506.07(1)(c) requires that:

(c) At the conclusion of each day of operation, all windblown material shall be collected and properly disposed of in the active area in accordance with the provisions of this section unless the operator establishes, to the

satisfaction of the department, that all windblown material cannot be collected using reasonable efforts because of conditions beyond the control of the operator, and windblown material which can be collected using a reasonable effort has been collected and properly disposed and nuisance conditions do not exist.

The Petitioners have established multiple violations of this code requirement.

4. The requirements for daily cover are set forth in Wis. Admin. Code NR 506.05(1)

All solid waste disposed in a municipal solid waste landfill shall be compacted and completely covered at the end of each operating day with a compacted layer of at least 6 inches of soil. Alternate daily cover materials may be approved or mandated by the department as required in s. NR 506.055. If clay soil is used for daily cover purposes, it shall be scarified or removed prior to placement of the next lift of solid waste.

The Petitioners have established multiple violations of this code requirement.

5. Wis. Admin. Code NR 506.07(1)(m) requires that:

(m) The landfill shall be surrounded with rapidly growing trees, shrubbery, fencing, berms or other appropriate means to screen it from the surrounding area and to provide a wind break.

No violation of this provision was established by the Petitioners.

6. The Orders below are necessary to effectuate the purposes of this chapter and enforce the same by all appropriate administrative and judicial proceedings.

ORDER

WHEREFORE, IT IS HEREBY ORDERED to effectuate the purposes of Wis. Stat. § 289.92 that the Department enforce the permit provision requiring daily pick-up of windblown debris.

IT IS FURTHER ORDERED that given the repeated violations of Wis. Admin. Code NR 506.07(1) by the Landfill that the Department consider imposing more specific permit requirements relating to the collection of windblown debris.

The Department should consider, but not be limited by, the following options:

- Install additional higher and or redundant fencing within the Landfill perimeter;

- Requiring the employment of part-time personnel solely dedicated to picking up windblown debris;
- Increased inspections, on up to a quarterly basis, for a period of no less than two years to ensure ongoing compliance with code and permit requirements.

Dated at Madison, Wisconsin on March 5, 2013.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review

shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.