

**BEFORE THE MISSISSIPPI COMMISSION
ON ENVIRONMENTAL QUALITY**

**MISSISSIPPI COMMISSION ON
ENVIRONMENTAL QUALITY**

COMPLAINANT

VS.

ORDER NO. 5952 11

**JOHN DIAMOND AND
DIAMOND DISPOSAL INC,
PO BOX 244
PERKINSTON, MISSISSIPPI 39573**

RESPONDENTS

ORDER

The above-styled cause came for hearing before the Mississippi Commission on Environmental Quality ("Commission") on March 24, 2011, pursuant to Miss. Code Ann. §§ 49-17-31 and 49-17-33. The Commission heard opening statements from counsel for the Mississippi Department of Environmental Quality ("MDEQ") and Respondents John Diamond and Diamond Disposal, Inc. (collectively "Diamond" or "Respondents"); approximately three and a half hours of testimony; recommendations of MDEQ staff; and closing arguments by both parties. Having considered the arguments of counsel, all of the testimony, including twenty-three exhibits, and being fully advised in the premises regarding this administrative enforcement case, the Commission finds as follows:

I. Factual Background

A. Procedural History

Diamond is the owner and operator of a Class I rubbish disposal facility located in Stone County, Mississippi (the "Site"). On January 4, 2011, pursuant to Miss. Code Ann. § 49-2-13,

the Executive Director of MDEQ issued Order No. 5878 11, which required Respondents to “cease and desist all waste acceptance and disposal activities” at the Site. (Transcript at Ex. MDEQ-19 at ¶ 6.A.) (the “Cease and Desist Order”). The Cease and Desist Order further required Respondents to “provide a minimum of two (2) feet of low-permeability earthen cover of all exposed waste” and “implement any and all necessary erosion controls to prevent loss of sediment from the site” Id. at ¶¶ 6.B and 6.C. The Cease and Desist Order provided that MDEQ would consider allowing Respondents to resume operations only after the fulfillment of two conditions: (1) “all necessary permits have been obtained by Mr. Diamond and/or [Diamond Disposal, Inc.] for operation of the Site” and (2) “all pending civil enforcement actions are resolved.” Id. at ¶6.D.

Aggrieved by the Cease and Desist Order, on or about February 3, 2011, Respondents filed with MDEQ a document styled “Complaint,” wherein Respondents claimed that all “deficiencies of Diamond Disposal, Inc.” had been “cured or substantially cured.” (Tr. at Ex. MDEQ-23, p. 1) Respondents requested that the order be “set aside” and that Diamond “be allowed to operate” Id. at p. 3. Subsequently, on February 9, 2011, MDEQ issued a formal complaint letter scheduling an evidentiary hearing before the Commission and seeking resolution of certain outstanding enforcement actions. (Tr. at Ex. MDEQ-22) On March 24, 2011, the Commission conducted an evidentiary hearing to address both Respondents’ “Complaint” and MDEQ’s complaint letter.

B. Findings of Fact

The Cease and Desist Order had two primary factual bases. First, Respondents did not

hold a valid permit to operate the Site.¹ (Tr. at pp. 80-81; 83-84; 118, testimony of Ethan Mayeu; Ex. MDEQ-19 at ¶¶ 2-5). Second, violations which were cited in Notices of Violations issued in April, August and November 2010 had not been resolved. (Tr. at pp. 83-84, 118; Ex. MDEQ-19 at ¶ 5).

1. Permitting Issues

With respect to the permitting history of the Site, MDEQ offered testimony from Billy Warden, Manager of the Solid Waste and Mining Branch of the Environmental Permits Division of MDEQ. Through that testimony, MDEQ established, and the Commission finds, the following. On July 28, 1998, MDEQ, on behalf of the Mississippi Environmental Permit Board, issued to Diamond Disposal, Inc. Certificate of Coverage No. R1-056 under the Mississippi statewide general permit for Class I rubbish sites, permit no. SWGP-R1. (Tr. at pp. 18-19, testimony of Mr. Warden; Ex. MDEQ-1). That general permit expired, and was renewed, in January 2007. (Tr. at pp. 19-20). Respondents were required to obtain re-coverage under the re-issued general permit. (Tr. at pp. 20-21; Ex. MDEQ-2). By letter dated February 21, 2007, MDEQ provided Respondents a re-coverage application and requested that Respondents complete and submit the application by May 15, 2007. (Tr. at pp. 20-21; Ex. MDEQ-2). Respondents submitted an application which was received by MDEQ on May 16, 2007. (Tr. at p. 21; Ex. MDEQ-3).

However, that application was incomplete. (Tr. at p. 25). On February 20, 2008, MDEQ issued a Notice of Deficiency (“NOD”) to Respondents listing some twelve (12) deficiencies in the application. (Tr. at pp. 25-27; Ex. MDEQ-4). After MDEQ issued a second NOD, dated May 6, 2009, Respondents submitted a revised application on or about June 11, 2009. (Tr. at pp.

¹ As discussed more fully below, no valid permit existed for the Site because: (a) Respondents failed to submit a complete application for renewal of the expired permit coverage; and (b) Diamond Disposal, Inc. was, at some point

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28-31; Ex. MDEQ-5; Ex. MDEQ-6).

Because the revised application failed to contain all of the items requested in the previous NOD's, on June 19, 2009, MDEQ issued yet another NOD, this time listing four (4) remaining deficiencies. (Tr. at pp. 32-33; Ex. MDEQ-7). Having received no response to that NOD, MDEQ issued another NOD on December 8, 2009. (Tr. at pp. 38-39; Ex. MDEQ-8).

By letter dated March 8, 2011, after issuance of the Cease and Desist Order, Respondents, through counsel, submitted information purporting to cure the deficiencies noted in the June 19, 2009, NOD. (Tr. at Ex. MDEQ-9). However, that submittal attempted to address only one of the four deficiencies noted in the NOD. (Tr. at pp. 39-42; Ex. MDEQ-7; Ex. MDEQ-9). On March 16, 2011, MDEQ issued yet another NOD. (Tr. at p. 41; Ex. MDEQ-10). MDEQ's efforts to obtain from Respondents a complete application for re-coverage spanned over four years, yet despite those efforts, as of the date of the evidentiary hearing in this matter, Respondents had failed to complete the application. (Tr. at p. 41).

2. Compliance and Enforcement Issues

In the meantime, on April 1, 2010, MDEQ issued a Notice of Violation ("NOV") letter to John Diamond advising him, among other things, that his failure to submit the required annual report regarding the Site's 2009 operations constituted a violation of state solid waste management regulations and the general permit. (Tr. at pp. 58-61, testimony of Mr. Mayeu; Ex. MDEQ-13). Through the testimony of Ethan Mayeu, MDEQ established, and the Commission finds, the following regarding enforcement issues which were pending at the time of the hearing in this matter.

In the course of discussions regarding the annual report violation cited in the April 1,

2010, NOV,² information came to light that in 1999, less than a year after the Site's permit coverage was originally issued, Diamond Disposal, Inc., the corporate entity to which the permit coverage was issued, was administratively dissolved by the Mississippi Secretary of State. (Tr. at p. 63; Ex. MDEQ-14). Respondents' failure to obtain re-coverage under the re-issued general permit, coupled with the fact the corporate entity to which the permit coverage was issued initially, resulted in Mr. Diamond's operation of an un-permitted facility. (Tr. at pp. 63-64; Ex. MDEQ-14). In order to resolve these compliance issues without citing Mr. Diamond for operation of an unpermitted facility, MDEQ allowed Mr. Diamond an opportunity to reinstate his corporation. (Tr. at pp. 64-67; Ex. MDEQ-14; Ex. MDEQ-15).

Having not received any proof of reinstatement from Mr. Diamond, on November 3, 2011, MDEQ issued another NOV, this time citing Mr. Diamond for personally operating the Site without a permit. (Tr. at pp. 65-68, 80-81, Ex. MDEQ-17). Not until December 2010, after MDEQ's issuance of that NOV, did Mr. Diamond finally provide proof that the corporation had been reinstated. (Tr. at Ex. MDEQ-18). In the meantime, MDEQ had conducted an inspection of the Site on July 23, 2010, and discovered yet another violation – i.e. the presence of unauthorized waste. (Tr. at pp. 68-78; Ex. MDEQ-15; Ex. MDEQ-16).

This was not the first time that Respondents had been cited for accepting and disposing of unauthorized waste. MDEQ presented evidence of Respondents' compliance history, which included no fewer than five instances since 1999 when Respondents were cited for disposing of unauthorized waste. (Tr. pp. 54-57; Ex. MDEQ-11; Ex. MDEQ-12). Furthermore, the Commission finds, based upon the evidence presented by MDEQ, that Respondents have an extensive history of non-compliance involving a variety of violations with nine compliance

² Over the years since Respondents' permit coverage was issued in 1999, they were delinquent in filing the required annual report no fewer than nine times. Tr. at p. 61; Exhibit 14.

orders issued. (Tr. at p. 57; Ex. MDEQ-11; Ex. MDEQ-12).

In fact, Respondents' well-documented record of non-compliance continued with their failure to comply with the Cease and Desist Order – the very order that precipitated the evidentiary hearing in this matter. (Tr. at Ex. MDEQ-19). MDEQ presented video and photographic evidence that Respondents were, in direct contravention of the Cease and Desist Order, accepting waste at the Site as recently as March 21, 2011, three days prior to the hearing. (Tr. at pp. 85-93; Ex. MDEQ-20).

3. Respondents' Rebuttal Testimony

In response to the evidence presented by MDEQ, Respondents offered the testimony of John Diamond. Mr. Diamond testified, despite clear evidence to the contrary, that he believed his permit application was complete. (Tr. at p. 186 "I'd done everything that was supposed to be done."). Furthermore, while not denying any of the historical violations at the Site, Mr. Diamond took the position that those violations were largely "paperwork" violations. (Tr. at pp. 175; 181). Mr. Diamond also testified that he believed that he had complied with the conditions of the Cease and Desist Order. (Tr. at pp. 165, 168-170). The Commission finds that Respondents' permit application is not complete; that the historical violations at the Site involved much more than mere "paperwork" violations; and that Respondents violated the Cease and Desist Order.

II. Arguments of the Parties and Conclusions

A. Jurisdiction

The Commission has jurisdiction over this matter, and conducted the March 24, 2011, hearing, pursuant to Miss. Code Ann. §§ 17-17-2; 17-17-17; 17-17-29 49-2-9; 49-17-17; 49-17-31; and 49-17-33.

B. Affirmation of the Cease and Desist Order

Through the filing of their “Complaint,” Respondents sought to have the Commission lift the January 4, 2011, Cease and Desist Order. During the hearing of this matter, Respondents argued that they had met the conditions for lifting of the Cease and Desist Order and requested that the Commission allow them to resume operations at the Site. (Tr. at pp. 165; 168-70; 192; Ex MDEQ-23). For the reasons that follow, the Commission finds that Respondents have failed to meet the conditions of the Cease and Desist Order.

Evidence presented by MDEQ established that Respondents did not cease accepting waste at the Site after January 4, 2011, as required by the order. (Tr. at pp. 85-93; Ex. MDEQ-20). Further, Mr. Diamond admitted in his testimony that no effort had been made, *subsequent to the Cease and Desist Order*, to provide a minimum of two feet of earthen cover over all exposed waste. (Tr. at p. 182). Recent photographs of the Site corroborate this fact. (Tr. at Ex. MDEQ-21). Other photographs admitted into evidence indicate on-going erosion problems at the Site, which is another issue the Cease and Desist Order required Respondents to address. (Tr. at Ex. MDEQ-21). Finally, as of the date of the hearing in this matter, Respondents had neither obtained all necessary permits for operation of the Site nor resolved all pending enforcement actions. (Tr. at p. 41, testimony of Mr. Warden; pp. 83-85, testimony of Mr. Mayeu).

Additionally, MDEQ established through the testimony of Mr. Warden and Mr. Mayeu, and the Commission finds, that Respondents’ permit to operate a Class I Rubbish disposal facility at the Site terminated in 2007, and Respondents do not presently hold a valid permit. (Tr. at pp. 19-20; 41; 63-64; 83-85). MDEQ further offered the testimony of Harry Wilson, Chief of the Environmental Permits Division of the MDEQ Office of Pollution Control, who testified that MDEQ would, based on the lack of a complete application for renewal, and Respondents’ history of non-compliance, recommend to the Mississippi Environmental Permit Board (“Permit Board”)

that Respondents not be granted a permit to operate in the future. (Tr. at pp. 134-135).

The Permit Board, not the Commission, has exclusive authority to determine, subject to rules and regulations adopted by the Commission, whether environmental permits should be issued. See Miss. Code Ann. §§ 49-17-28; 49-17-29(3)(a). The Commission finds that Respondents, if they wish to resume operations at the Site, should be required to complete their application and seek approval from the Permit Board.

Even if the Commission possesses the authority to allow Respondents to operate the Site despite the absence of a valid permit, based on the long-standing history of violations at the Site, and Mr. Wilson's testimony that MDEQ staff would likely recommend that the Permit Board deny Respondents' permit application, the Commission declines to exercise any such authority. Accordingly, the Commission finds that the Cease and Desist Order should remain in effect until such time as Respondents secure, from the Permit Board, any and all necessary permits to resume operations.

C. Assessment of Civil Penalties

The Mississippi Solid Waste Disposal Law, Miss. Code Ann. 17-17-1 et seq., authorizes the Commission to assess civil penalties up to \$25,000.00 for any violation of any order, rule, or regulation of the Commission, any order issued by the Commission (or on its behalf), or any permit. See Miss. Code Ann. § 17-17-29(1). Subsection 7 of Miss. Code Ann. § 17-17-29 enumerates seven factors which the Commission must consider, "at a minimum," in assessing civil penalties. Those factors include: (1) willfulness of the violation; (2) damage to the natural resources of the state; (3) costs of restoration or abatement; (4) economic benefit of noncompliance; (5) seriousness of the violation, including "any hazard to the health, safety and welfare of the public"; (6) "past performance history"; (7) and whether the violation was self-

reported. Miss. Code Ann. § 17-17-29(7)(a)-(g).

The Commission interprets Miss. Code Ann. § 17-17-29 to not require each of these seven factors to apply in a given case. The Commission interprets the statute to require only that all seven factors be considered in light of the evidence presented, and the Commission's findings on any one or more of the factors may be sufficient to justify a statutory maximum penalty.

MDEQ, through the testimony of Chris Sanders, Chief of the Environmental Compliance and Enforcement Division of the MDEQ Office of Pollution Control, recommended that the Commission assess a penalty of \$25,000.00 for Respondents' acceptance of unauthorized waste as witnessed and documented by Ethan Mayeu during the July 23, 2010, inspection of the Site. (Tr. at pp. 68-78, testimony of Mr. Mayeu; p. 148, testimony of Mr. Sanders; Ex. MDEQ-16). It is important to note that, despite the fact that Respondent John Diamond operated the Site without a permit for some period of time, given the course of conduct and dealing between the parties – i.e. MDEQ has acted as if the permit was valid – MDEQ did not recommend the assessment of a civil penalty for Mr. Diamond's unpermitted operation of the Site. (Tr. at pp. 148-149, testimony of Mr. Sanders). MDEQ also did not request that the Commission assess a penalty amount for Respondents' late submittal of the 2009 Annual Report as referenced in the April 1, 2010, NOV.

The Commission has considered the statutory penalty factors in light of the facts of this case and finds as follows. Respondents accepted wastes not authorized for disposal in a Class I Rubbish Site. This violation was observed on July 23, 2010. Given the fact that Mr. Diamond is a certified Class I Rubbish Site operator, and the fact that Respondents have been cited multiple times in the past for acceptance and disposal of unauthorized waste, the Commission finds that Mr. Diamond knew or should have known the types of waste that constituted unauthorized waste.

(See Tr. at pp. 142-143, testimony of Mr. Sanders; Ex. MDEQ-6 (Certificate of Competency); Ex. MDEQ-12). Accordingly, the Commission finds that the violation was willful. Miss. Code Ann. § 17-17-29(7)(a).

Similarly, the Commission finds that Respondents have a long-standing and diverse history of non-compliance at the Site. See Miss. Code Ann. § 17-17-29(7)(f). Respondents' compliance history alone could justify a statutory maximum penalty in this matter.

While no actual damage to the environment has been documented or quantified by MDEQ, the Commission finds that the disposal of unauthorized waste in a Class I Rubbish Site poses a significant risk to human health and/or the environment. (Tr. at pp. 15-17, testimony of Mr. Warden; pp. 143-144, testimony of Mr. Sanders). Accordingly, the Commission finds that the violation is serious. Miss. Code Ann. § 17-17-29(7)(e).

Although not quantified by MDEQ, the Commission finds that because Respondents received compensation (whether in the form of a per-ton tipping fee or otherwise) for all waste disposed of at the Site, including unauthorized waste, Respondents realized some amount of economic benefit from their acceptance of unauthorized waste. (Tr. a pp. 145-147, testimony of Mr. Sanders; p. 166, testimony of Mr. Diamond (admitting he accepted payment for receiving waste after issuance of the Cease and Desist Order)). Miss. Code Ann. § 17-17-29(7)(d).

With respect to the remaining statutory penalty factors, the Commission finds that they do not apply and/or should not impact the penalty in this matter. There was no evidence presented at the hearing regarding the cost of restoration and/or abatement. Similarly, there was no evidence that the violation at issue was self-reported by Respondents.

Based on the evidence presented and the findings of fact detailed above, and considering the Commission's duty to protect the integrity of the permitting system as well as human health

and public welfare, the Commission finds that a substantial penalty should be assessed against Respondents. In consideration of the factors stated in Miss. Code. Ann. Section 49-17-43(7), the Commission accepts MDEQ's penalty recommendation.

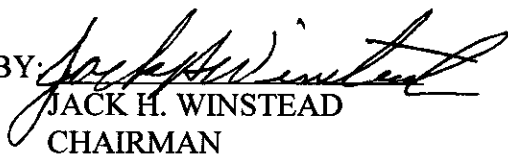
IT IS THEREFORE ORDERED AND ADJUDGED that Order No. 5878 11 is hereby affirmed. Specifically, Respondents shall not accept or dispose of any waste at the Site until such time as Respondents obtain all necessary permits for operation of the Site. Furthermore, Respondents shall as soon as practicable, but in no event later than thirty (30) days after issuance of this Order, provide a minimum of two (2) feet of low-permeability earthen cover over all exposed waste at the Site and implement any and all necessary erosion controls to prevent the loss of sediment from the Site. Notwithstanding any of this, should Respondents fail, or choose not, to obtain permits to operate the Site, Respondents shall comply with all final closure requirements of Section VI of the Mississippi Non-hazardous Waste Management Regulations.

IT IS THEREFORE FURTHER ORDERED that Respondent is hereby assessed a penalty in the amount of \$25,000.00, which shall be paid to the Commission within thirty (30) days of the date of issuance of this Order.

This is a final Order of the Commission appealable according to the provisions of Miss. Code Ann. § 49-17-41. The amount of the appeal cost bond is set at \$500.00.

SO ORDERED, this the 28th day of April, 2011.

MISSISSIPPI COMMISSION ON
ENVIRONMENTAL QUALITY

BY: 
JACK H. WINSTEAD
CHAIRMAN