

ILLINOIS POLLUTION CONTROL BOARD
April 6, 1995

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Complainant,)	AC 94-96
)	(IEPA No. 697-94-AC)
)	
v.)	AC 94-97
)	(IEPA No. 698-94-AC)
M.K. O'HARA CONSTRUCTION,)	(Consolidated)
INC., KENNETH O'HARA AND)	(Administrative Citations)
MADALYN O'HARA,)	
)	
Respondents.)	

MS. MELANIE JARVIS, ASSISTANT COUNSEL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

MR. KENNETH O'HARA AND MRS. MADALYN O'HARA APPEARED PRO SE.

INTERIM OPINION AND ORDER OF THE BOARD (R.C. Flemal):

This matter is before the Board pursuant to a petition for review of two administrative citations timely filed by respondents, M.K. O'Hara Construction, Inc., Mr. Kenneth O'Hara, and Mrs. Madalyn O'Hara (collectively O'Hara), on December 16, 1994. O'Hara requests review of the administrative citations issued by the Illinois Environmental Protection Agency (Agency) on October 24, 1994 and filed with the Board on December 2, 1994. Pursuant to the Environmental Protection Act (Act) (415 ILCS 5/1 et seq.) parties may appeal an administrative citation within 35 days of the date of service of the citation. (415 ILCS 5/31.1 (b)(4)(1992).)

On February 16, 1995 the Board accepted the petitions for review, consolidated AC 94-96 and AC 94-97 for the purposes of hearing, and set the cases for hearing. Hearing was held before Hearing Officer Michael L. Wallace on February 22, 1995 in Virginia, Illinois. No post-hearing briefs were filed.

Today, on its own motion, the Board hereby further consolidates these two cases for the purpose of decision.

Each administrative citation alleges a single violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1)) which carries a statutory civil penalty of \$500 each if the Board finds that such violations occurred, for a total penalty of \$1000. For the reasons set forth below, the Board today will find two violations based upon the Agency's allegations that respondents, M.K. O'Hara Construction, Inc., Mr. Kenneth O'Hara and Mrs. Madalyn O'Hara, have violated Section 21(p)(1) at both locations. The Board will

find respondents liable for \$1000 and any associated hearing costs incurred by the Agency and the Board.

FACTS

O'Hara is the present owner and operator of the sites in question, located in the County of Cass. The first site, subject of AC 94-96, is commonly known to the Agency as the Beardstown/O'Hara #3 (Site #3) and is designated with Site Code No. 0170150020. (AC 94-96 Complaint at 1.) Site #3 is located approximately one mile south-southwest of Beardstown, off Highway 100. (Tr. at 6.) The second site, subject of AC 94-97, is commonly known to the Agency as the Beardstown/O'Hara #4 (Site #4) and is designated with Site Code No. 0170150021. (AC 94-97 Complaint at 1.) Site #4 is located east of Beardstown near the City limits. (Tr. at 6.) Site #3 has a salvage license¹ from the Secretary of State. (Tr. at 29-30.) However, neither site has an Agency Operating Permit allowing it to conduct dumping operations. (AC 94-96 Complaint at 1; AC 94-97 Complaint at 1.) The administrative citations allege that O'Hara violated Section 21(p)(1) of the Act at both Sites #3 and #4 by causing or allowing open dumping in a manner which resulted in litter.

The administrative citations are based upon inspections of Sites #3 and #4 on October 24, 1994 by William Walkenbach. Mr. Walkenbach is a field inspector employed by the Agency. (Tr. at 5.) Mr. Walkenbach also inspected Sites #3 and #4 on two prior occasions, May 5, 1994 and August 15, 1994. Mr. Walkenbach was accompanied by Mr. Charles King on the May 5, 1994 inspection (Tr. at 34-43), and by Mr. John Senjan on the August 15, 1994 inspection (Tr. at 43-48). At the Board's February 22, 1995 hearing Mr. Walkenbach, Mr. King, and Mr. Senjan each presented testimony regarding their observations of litter at the two O'Hara sites².

¹ It is unclear from the record whether all or only a part of Site #3 is governed by the salvage yard license. Regardless, salvage yards have been previously cited for violations of Section 21(p)(1). IEPA v. Bill Hammond (April 22, 1993), AC 92-62, 141 PCB 285, Sangamon County v. Ruth Ann Sheppard and Steve Sheppard (November 4, 1993), AC 93-6, 141 PCB 293.

² The Board notes that the witnesses also raised several issues not encompassed in the definition of litter (e.g., presence of vectors). Inasmuch as this citations is solely directed to the matter of litter, the Board will not further address these extraneous issues.

In reference to Site #3, Mr. Walkenbach testified that as a result of his first inspection on May 5, 1994, the Agency sent an Administrative Warning Notice to O'Hara on June 7, 1994 (Tr. at 23, 29, 33; Complaint's Exhibit 5.) Mr. Walkenbach thereafter reinspected Site #3 on August 15, 1994 and found matters in generally the same condition as on the previous inspection. (Tr. at 8.)

The administrative citation at issue for Site #3 is the result of the third and final inspection conducted by Mr. Walkenbach on October 24, 1994. Mr. Walkenbach was accompanied by an employee of O'Hara, Mr. Richard Lashbrook, on the October 24th inspection. (Tr. at 9.) At hearing Mr. Walkenbach testified that Site #3 was in substantially the same condition as it was on the August 15th inspection. (Tr. at 9.) According to Mr. Walkenbach's testimony and the seven photographs taken during the October 24, 1994 inspection of Site #3, the following items were among those scattered about the property: drums, including one orange and white drum labeled "Exxon Univolt N61", with a hazardous waste warning notice (Tr. at 11; Photo #7); demolition debris and cardboard (Tr. at 11-12; Photos #7,8,9); two metal containers of unknown material, possibly asbestos insulation (Tr. at 13; Photo #11); tractor tires and other tires holding water (Tr. at 13; Photo #13); and roofing and railroad ties (Walkenbach Memorandum attachment to Citation).

In reference to Site #4, Mr. Walkenbach testified that as a result of his first inspection on May 5, 1994, the Agency sent an Administrative Warning Notice to O'Hara on June 6, 1994 (Tr. at 23, 29, 33; Complaint's Exhibit 6.)

The administrative citation at issue for Site #4 is also the result of the third and final inspection conducted by Mr. Walkenbach on October 24, 1994. (Tr. at 14.) At hearing Mr. Walkenbach testified that Site #4 was in pretty much the same condition on October 24, 1994 that it had been on the August 15th inspection. (Tr. at 15.) According to Mr. Walkenbach's testimony and the nineteen photographs put into evidence from the October 24th inspection of Site #4, the following items and materials were among those scattered about the property: metal and tires (Tr. at 16-18; Roll 97, Photo #1,2,4,5,10,11 and Roll 98, Photo #3); old rusty vehicles (Tr. at 19-20; Roll 97, Photo #9,10 and Roll #98, Photo #1); part of a box trailer and a semi-truck trailer with no axle (Tr. at 19-20; Roll 97, Photo #11); pipes and metal with insulation (Tr. at 20; Roll 97, Photo #13); propane tanks (Tr. at 21; Roll 98, Photo #3); broken battery case and battery (Tr. at 22-22; Roll 98, Photo #3,7,8); and a mattress (Tr. at 22; Roll 98, Photo #8).

Mr. King, who is a field investigator and Environmental Protection Specialist 3 employed by the Agency, testified to conditions at both Sites #3 and #4 as found during the May 5,

1994 inspections. (Tr. at 34-43.) Mr. King affirmed the presence of the materials observed by Mr. Walkenbach, with the addition of a dry transformer and broken batteries found at Site #3 (Tr. at 37), and televisions and broken appliances found at Site #4 (Tr. at 38-39).

Mr. Senjan, who is a solid waste inspector and Environmental Protection Specialist 1 employed by the Agency, likely affirmed Mr. Walkenbach's general observations regarding conditions at both Site #3 and #4 as observed by the pair on August 15, 1995. (Tr. at 43-47.)

DISCUSSION

Regulatory Framework

The Act establishes that in order to seek enforcement by way of the administrative citation process for violations of Section 21(p), the Agency must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted in litter, open burning, or other specified conduct at the dump site. If the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty. The only mitigation of a violation is if "...the person appealing the citation has shown that the violation resulted from uncontrollable circumstances", in which case the Board shall adopt an ordering which imposes no penalty. (415 ILCS 5/31.1(d)(2) (1992).)

The administrative citation issued against O'Hara alleges that Section 21(p) subsection (1) of the Act was violated at each site. Section 21(p)(1) provides that no person shall in violation of Section 21(a) of the Act:

cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;

(415 ILCS 5/21(p)(1) (1992).)

Section 21(a) of the Act sets forth a general prohibition against open dumping by providing that "[n]o person shall cause or allow the open dumping of any waste".

Section 3.24 of the Act defines "open dumping" as:

the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.

(415 ILCS 5/3.24 (1992).)

Section 3.31 of the Act defines "refuse" as "waste". (415 ILCS 5/3.31 (1992).) Section 3.53 of the Act defines "waste" as, inter alia, "garbage...or other discarded material, including solid, liquid, industrial, commercial, mining and agricultural operations, and from community activities..." (415 ILCS 5/3.53 (1992).)

In St. Clair County v. Louis Mund (August 22, 1991), AC 90-64, 125 PCB 381, the Board adopted the definition of "litter" contained in the Litter Control Act:

"litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle...or anything else of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly.

(415 ILCS 105/3 (1992).)

Defenses

Next the Board must consider whether O'Hara has shown that the alleged violations resulted from uncontrollable circumstances. This is the only showing provided in the statute that allows the Board to excuse any violation. If the Board so finds, then no violations would be found and no penalty imposed. (see 415 ILCS 5/31.1(d)(2) (1992).)

O'Hara presented several arguments at hearing. First, O'Hara claims that it is now cleaning the site and properly disposing of the material at issue. However, the Board has held that post-citation activities of the citation recipient are not material to whether a violation had occurred and accordingly to the Board's review of the citation. (In re: Lincoln Chamber of Commerce (May 25, 1989), AC 89-26, 99 PCB 325.) The Board has previously held that removal of the litter after the issuance of an administrative citation does not restrain the Board from a finding of violation. The Act, by its terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans up the site. (IEPA v. Jack Wright (August 30, 1990), AC 89-227, 114 PCB 863.) Clean-up of the site is not a mitigating factor under the administrative citation program. (IEPA v. Dennis Grubaugh (October 16, 1992), AC 92-3, 136 PCB 425.)

O'Hara also contends that the property contained many of the items characterized as litter when purchased by O'Hara (Tr. at 49), and that most of the abandoned vehicles on the property are not O'Hara's but rather were placed there by a tenant (Tr. at 50-51). The Board has held that passive conduct amounts to acquiescence sufficient to find a violation of the Act. (Illinois Environmental Protection Agency v. Bill Hammond (April 22, 1993), AC 92-62, 141 PCB 285; EPA v. Dobbeke et al. (August 22, 1972), PCB 72-130, 5 PCB 219.) In Freeman Cool Mining Corp. v. IPCB (3rd Dist. 1974), 21 Ill. App. 3d 157, 313 N.E. 2d 616, the court additionally observed that the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt. Present inaction on the part of the landowner to remedy the disposal of waste that was previously placed on the site, constitutes "allowing" litter in that the owner allows the illegal situation to continue.

O'Hara presented other explanations why the property was in such observed condition, including: 90% of the material was salvageable (Tr. at 25-26); the big trailer and box trailer were being used for storage (Tr. at 26); they have been very busy (Tr. at 26); and they accepted a lot of washing machines and stoves to prevent them from being dumped along the roadside (Tr. at 56). The Board finds no uncontrollable circumstances in this matter.

CONCLUSION

Based on its review of the pertinent provisions of the Act and the definitions of open dumping and litter, the Board finds that opening dumping resulting in litter occurred at both Sites #3 and #4, as of October 24, 1994 as evidenced in the administrative citations and testimony offered by the Agency.

The presence of the litter on the site and the failure by the owner to take action is sufficient to find a violation of the "allow" language of Section 21 of the Act. The Board finds that O'Hara allowed litter on the property in violation of the Act.

The Board further finds that none of the explanations offered for the presence of litter justify a finding of uncontrollable circumstances. O'Hara accordingly is found to have violated the open dumping provisions of the Act, and this Board will accordingly affirm the Agency's determination of violation and assessment of penalty.

PENALTY AND COSTS

Penalties in administrative citation actions are prescribed by Section 42(b)(4) of the Act which states:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979, as amended;

(415 ILCS 5/42(b)(4) (1992).)

In the Board's final order in this case, O'Hara will be ordered to pay a civil penalty of \$500 for each violation as found, totalling \$1000. Further, pursuant to Section 42(b)(4) of the Act, O'Hara is also required to pay hearing costs incurred by the Board and the Agency. Those costs are not contained in the record at this time. Therefore as part of this interim order, the Clerk of the Board and Agency are ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon respondents.

This interim opinion constitutes the Board's interim findings of fact and conclusions of law in this matter. A final order will be issued pursuant to the interim order which follows.

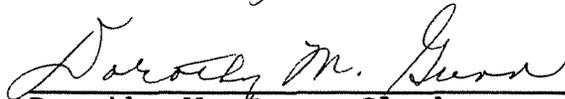
INTERIM ORDER

1. Respondents, M.K. O'Hara Construction, Inc., Kenneth O'Hara, and Madalyn O'Hara, are hereby found to have violated 415 ILCS 5/21(p)(1)(1992) at Beardstown/O'Hara #3 and Beardstown/O'Hara #4 on October 24, 1994.
2. The Illinois Environmental Protection Agency is hereby directed to file a statement of its hearing costs, supported by affidavit, with the Board and with service on the respondents, M.K. O'Hara Construction, Inc., Kenneth O'Hara, and Madalyn O'Hara, within 14 days of this order. Within the same 14 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon the respondents, M.K. O'Hara Construction, Inc., Kenneth O'Hara, and Madalyn O'Hara.
3. Respondents, M.K. O'Hara Construction, Inc., Kenneth O'Hara, and Madalyn O'Hara, are hereby given leave to file a reply to the filings ordered in paragraph 2 within 14 days of receipt of that information, but in no case later than 40 days after the date of this order.

4. After the deadline for filing such information and reply thereto has expired, the Board will issue a final order assessing the statutory penalty, and making the appropriate award of costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 6th day of April, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board