

ILLINOIS POLLUTION CONTROL BOARD
February 2, 1989

IN THE MATTER OF:)
)
BEECHER DEVELOPMENT COMPANY,) AC 88-14, Docket A and B
FORMERLY NAMED AS) IEPA No. 8842-AC
ARTHUR A. DANIELS, PRESIDENT)
OF JOHN SEXTON CONTRACTORS, CO.,)
)
Respondent.)

WILLIAM SELTZER, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY; AND

NANCY KOLLAR, WINSTON AND STRAWN, APPEARED ON BEHALF OF THE
RESPONDENT, BEECHER DEVELOPMENT COMPANY.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on a Petition for Review filed on March 21, 1988 by Beecher Development Company (Beecher) to contest an Administrative Citation (Citation). Although the citation originally named Arthur A. Daniels (Daniels) as the Respondent in this matter, the Agency made a motion to amend the citation during the hearing to name Beecher Development as the Respondent. Beecher agreed to this amendment, the order was granted and Daniels was removed as the Respondent. The citation was served on Daniels on February 13, 1988 by the Illinois Environmental Protection Agency (Agency). (February 13th is the presumptive date of service since the return of service was signed but undated.) Hearing was held on September 26, 1988; one member of the public was in attendance as an observer. The Agency filed a Closing Argument on December 2, 1988. Beecher filed a Closing Argument on December 23, 1988.

The Board notes that the Agency filed its Closing Argument significantly later than the deadline ordered by the Hearing Officer which in turn delayed the filing of Beecher's Closing Argument since it was to be filed three weeks after the Agency's. Although the Board, on its own motion accepts the Agency's Closing Argument, it strongly cautions the Agency to follow proper procedure in these matters.

Beecher operates a sanitary landfill in Will County, pursuant to Agency Operating Permit No. 1971-24-OP. On January 11, 1988, Mr. Darren Brumfield, an Agency representative, inspected the landfill site. On the basis of Mr. Brumfield's

inspection, the Agency determined that Beecher had operated the site in violation of the Act on the day of inspection and issued an administrative citation pursuant to Section 31.1(b) of the Environmental Protection Act (Act) Ill. Rev. Stat., 1986 Supp., ch. 111 1/2, par. 1031.1(b). The citation was based on two alleged violations of the Act - Sections 21(p)(5) and 21(p)(12).

Section 21(p)(5) and Section 21(p)(12) state as follows:

No person shall:

- p) Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:
 - 5) uncovered refuse remaining from any previous operating day or at the conclusion of any operating day, unless authorized by permit;
 - 12) failure to collect and contain litter from the site by the end of each operating day.

Ill. Rev. Stat., 1986 Supp., Ch. 111 1/2, par. 1021(p)(5) and (p)(12).

Accordingly, the Agency issued an Administrative Citation on February 9, 1988 to Beecher, including notice that a civil penalty of \$500 would be assessed for each of the two violations, pursuant to Section 42(b)(4) of the Act.

Beecher contests the Agency's determination of the 21(p)(5) violation for uncovered refuse remaining from a previous day. Beecher admits to a violation of 21(p)(12) for failure to collect litter, but claims that the violation resulted from uncontrollable circumstances, an affirmative defense provided in the Act:

- ... if the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.

Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1031.1(d)(2).

Failure to Provide Daily Cover

In support of its determination that Beecher failed to provide daily cover, the Agency submits photographs (Agency Composite Ex. 1, photos 10-13) taken by Mr. Brumfield during his site inspection of January 11, 1988. These photographs show various views of the area on the hill above the active area of the landfill as it existed on the morning of January 11, at times ranging from 8:30 a.m. to 10:30 a.m. These photographs show uncovered refuse that contains debris such as paper, plastics, tires, etc. (Agency Comp. Ex. 1, photos 10-13).

In contesting the Agency's determination, Beecher asserts in its Petition for Review that the uncovered refuse shown in photographs 10-12 is actually refuse from cleaning out transfer trailers. (Pet. at 3). Beecher's site supervisor, Mr. Tom Ricciardone, testified that it is Beecher's policy to clean out the transfer trailers away from the active area after they have dumped their load, before leaving the site. (R. at 62). Mr. Ricciardone also testified that he thought perhaps ten to twelve truck loads had been dumped in the hour prior to the Agency's inspection. (R. at 63).

The Board assumes that Beecher is asserting that the uncovered refuse shown in Agency photographs was deposited by trailers cleaning out on the morning of the inspection and not remaining from the previous day. The evidence in the record does not support Beecher's assertion. Beecher's evidence indicates that there is a policy requiring the transfer trailers to clean out before they leave the site (R. at 60) and Mr. Ricciardone testified that this is done away from the face of the active fill. (R. at 62). The record does not contain evidence however, that some trailers did in fact clean out in the area photographed by the Agency (Agency Ex. 1, photos 10, 11 & 12) on the morning of the inspection, January 11, 1988. Further, those Agency photographs (10, 11, 12) depict quantities of uncovered refuse too great to be generated by even the possible ten to twelve trailers cleaning out during the hour prior to the inspection. Thus, the Board is not persuaded by Beecher's bald assertion that the uncovered refuse was "actually refuse from cleaning out transfer trailers". (Pet. at 3)

At hearing, Beecher made a new assertion regarding the 21(p)(5) violation for uncovered refuse; this assertion was mentioned in the Closing Argument. Beecher argues that the refuse shown in photographs 10-12 is "wrecking debris put down by Beecher pursuant to permit for temporary roads and turn-around areas at the site". (Closing Argument at 6, R. at 79-82). Beecher points out that its supplemental permit allows it to use asphalt shingles, roll roofing, broken concrete, brick and wooden pallets as temporary road building materials and asserts that those are the materials shown in photographs 10-12. (R. at 76;

also see Beecher Ex. 5). In response to the Agency's comment that there is substantial debris in the photographs besides the alleged permitted road building materials, Beecher asserts that those materials (e.g., paper, tires) "would get picked up". (R. at 81).

The Board is not persuaded by Beecher's assertion that the refuse shown in photographs 10-12 was solely wrecking debris put down for temporary roads and not a violation of the daily cover requirement. The photographs, as discussed and the testimony of Mr. Brumfield (R. at 29-43) demonstrate that the daily cover requirement had not been met for the refuse disposed on at least the previous work day. Photographs 10-12 clearly indicate substantial uncovered refuse, apart from wrecking debris for road building. Additionally, Beecher's own witness, Mr. Ricciardone, admitted that the refuse shown in photograph 10 had been left uncovered since at least Saturday, January 9, the previous work day. (R. at 79,80). Even if the Board were to accept Beecher's assertion that the materials shown in the photographs were intended for on-site roads, such materials must consist only of wrecking debris, wrecking debris must be culled of any refuse and the refuse must receive daily cover. Accordingly, the Board finds that the Agency's determination of violation on the count of failure to provide required daily cover was correct, and hereby upholds that determination of violation.

Failure to Collect and Contain Litter

In support of its determination that Beecher failed to collect and contain litter, the Agency submits additional photographs (Agency Comp. Ex. 1, Photos 7-9) also taken by Mr. Brumfield during his site inspection of January 11, 1988. Beecher does not contest the validity of the Agency's determination but argues that the violation was a result of uncontrollable circumstances and should be excused under Section 31.1(d)(2) of the Act. (Pet. at 3).

Beecher claims that the uncontrollable circumstances which caused its failure to collect and contain litter was the "sub-zero temperatures on the days immediately preceding the inspection." (Pet. at 3). Beecher further asserts that the cold temperatures "made it unsafe for litter pickers to be outdoors for extended periods of time." (Pet. at 3). Specifically, Beecher explains that one of their workers, employed as a litter picker, suffered "severe frostbite in both feet" during the week before the inspection. As a result the site supervisor, Mr. Ricciardone, in order to avoid exposing other workers to frostbite instructed the litter pickers to avoid prolonged exposure to the cold by coming inside frequently to warm up. (R. at 85).

As evidence of the cold temperatures during the week before the inspection, Beecher relies on 7:00 a.m. temperature readings recorded in the landfill log book. Those 7:00 a.m. temperatures were: Tuesday, January 5th, -10° ; January 6th, -11° ; January 7th, 0° ; January 8th, 1° ; January 9th, 3° ; January 10th, landfill closed; January 11th, the day of the inspection, 17° . (R. at 96). The Board notes here that inclusion of the afternoon temperatures recorded by NOAA, is useful in completing the picture. Thus, the afternoon temperatures for that week were: Tuesday, January 5th, -2° (3:00); January 6th, 2° (3:00); January 7th, 14° (3:00); January 8th, 17° (12:00); January 9th, 7° (12:00). (Agency Ex. 3). Consequently, the daytime temperatures during the week prior to the inspection were for the most part above 0° F. The Board does not base a decision in this case on any particularly set temperature reading but finds Beecher's claim regarding the "sub-zero temperatures on the days immediately preceding the inspection" (Pet. at 3) to be somewhat misleading.

The Board has discussed the issue of uncontrollable circumstances as a defense to a citation in previous cases. In Heusinkved, AC 87-25A, the Board held that the windy conditions under the facts of that case did not constitute uncontrollable circumstances in the landfill's failure to collect and contain litter. Specifically, the Board stated that "it is precisely because litter control is at times difficult that it is necessary for policing of litter to be carried out on a regular basis, so as to preclude major dispersement when the ability to contain litter is less than optimal". (Heusinkved, AC 87-25A at 6).

In contrast, the Board did find uncontrollable circumstances as a defense for a violation of the six inches of daily cover requirement in Rantoul, AC 87-100. In that case, the Board found that unusual circumstances, including slope characteristics of the landfill and a torrential rain of rare occurrence which resulted in flash flooding, constituted uncontrollable circumstances pursuant to Section 31.1(d)(2) of the Act.

The Board finds that under the facts of this case, the cold temperatures do not amount to uncontrollable circumstances such as the flash flooding in Rantoul. The admittedly below normal temperatures created less than optimal conditions for collecting and containing litter, as in Heusinkved. Although the Board hardly criticizes Beecher's instituting protective procedures for its employees and does consider frostbite a serious injury, the weather situation in this case was not an acceptable rationale for failure to collect litter. During the coldest month of the year, Beecher should expect low temperatures and could have remedied the situation by utilizing other personnel, hiring more paper pickers or by assuring proper equipment. (Indeed, the accident report for the frostbitten employees cites "improper footgear for job." Beecher Ex. 6).

Although the Board perceives that there could be a situation where the temperature extremes could contribute to uncontrollable circumstances, such is not the case under these facts. Not only is evidence in the record regarding temperatures incomplete but evidence as to the date of the frostbite injury is conflicting and evidence as to the cause and extent of the injury is unclear. (R. at 88, 91 and 92; Beecher Ex. 6 and 7). The Board has addressed the nature of the frostbite injury since Beecher's claim to uncontrollable circumstances rests on a "warmup" policy as a result of that injury. Thus, evidence regarding that injury which is conflicting or unclear severely weakens Beecher's case.

Although the temperatures during that week were below normal (see "NOAA Local Climatological Data", Agency Ex. 3) they were not so unusual for January so as to constitute uncontrollable circumstances.* The Board does not consider it necessary to wait until frostbite occurs in order to institute a "warm up" policy when the temperatures are low. Indeed, the Board considers it good management practice to anticipate the need to protect workers. However, protection from frostbite and compliance with litter collection requirements are not mutually exclusive. Because of the added down-time during the cold weather, Beecher should have been prepared to meet the litter collection requirements while still providing worker safety.

Thus, the Board finds that Beecher has not borne its burden of proof of showing that the failure to collect and contain litter resulted from uncontrollable circumstances as envisioned in Section 31.1(d)(2). The record sufficiently shows that litter could have been and in fact was collected in spite of conditions. Therefore, the Board finds that the violation of the requirement to collect and contain litter was not due to uncontrollable circumstances and hereby upholds the determination of violation and the penalty imposed.

PENALTIES

Penalties in Administrative Citation actions of the type here brought are proscribed by Section 42(b)(4) of the Act, to wit:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p)

* Neither party agreed that any compounding factors, such as wind velocity or heavy snowfall, played a role during the week prior to the inspection. The Board notes that winds were recorded as light to moderate during the working hours from 6 a.m. to 3 p.m. (See Beecher Grp. Ex. 3; Agency Ex. 3, "NOAA Local Climatological Data" from O'Hare International Airport).

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...

Ill. Rev. Stat., 1986 Supp., ch. 111 1/2, par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of \$1000, based on the two violations as herein found. For purposes of review, today's action (Docket A) constitutes the Board's final action on the matter of the civil penalty.

Respondent is also required to pay hearing costs incurred by the Board and the Agency. The Clerk of the Board and the Agency will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Beecher. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed. Additionally, Docket B will be opened to treat all matters pertinent to the issue of costs.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Respondent is hereby found to have been in violation on January 11, 1988, of Ill. Rev. Stat. 1986 Supp., Ch. 111 1/2, par. 1021(p)(5) and 1021(p)(12).
2. Within 45 days of this Order of February 2, 1989, Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$1000 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

3. Docket A in this matter is hereby closed.
4. Within 30 days of this Order of February 2, 1989, the Illinois Environmental Protection Agency shall file a statement of its hearing costs, supported by affidavit,

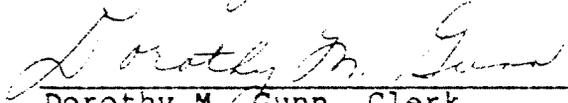
with the Board and with service upon Beecher. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Beecher. Such filings shall be entered in Docket B of this matter.

5. Respondent is hereby given leave to file a reply/objection to the filings as ordered in 4) within 45 days of this Order of February 2, 1989.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of Final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2nd day of February, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board