

ILLINOIS POLLUTION CONTROL BOARD  
February 28, 2019

GARY L. POLCHOW, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 15-157  
 ) (Citizens Enforcement – Air, Water)  
 VILLAGE OF RANKIN, )  
 )  
 Respondent. )

WILLIAM P. DREW III OF DREW LAW FIRM APPEARED ON BEHALF OF  
COMPLAINANT; and

ANDREW MUDD AND KAYLAN HUBER OF DAVIS & DELANOIS APPEARED ON  
BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B.K. Carter):

This citizens’ enforcement action concerns a public works property located in Rankin, Vermilion County. Complainant Gary L. Polchow alleges that the Village of Rankin (Village) violated the Environmental Protection Act (Act) by openly burning waste at its public works property.

On March 3, 2016, the Board issued an order partially granting and partially denying the Village’s motion to dismiss the complaint. The Board ultimately retained the alleged violations of Sections 9(a) and 9(c) of the Act (415 ILCS 5/9(a), (c) (2016)).

For the reasons below, the Board finds that Mr. Polchow did not meet his burden of proving that the Village violated Sections 9(a) or 9(c) of the Act. Accordingly, the Board dismisses this case and closes the docket.

The Board’s opinion begins with the case’s procedural history followed by the facts. The Board then provides the applicable law and analyzes the issues, reaches its conclusions, and issues its order.

**PROCEDURAL HISTORY**

On February 9, 2015, Mr. Polchow filed a *pro se* complaint (Compl.) alleging that the Village violated multiple sections of the Act by burning landscape waste along with chemicals, gas, oil, diesel fuel, plastic and rubber at its public works property in Vermilion County. Compl. at ¶4-6. On March 19, 2015, the Board entered an order accepting the complaint for hearing. Polchow v. Village of Rankin, PCB 15-157, slip op. at 2 (Mar. 19, 2015). In that same order, the

Board took official notice of photos from a prior proceeding<sup>1</sup> and made them part of the record in this proceeding. *Id.*

On August 6, 2015, the Village moved to dismiss the complaint for failing to state a cause of action. On March 3, 2016, the Board entered an order partially granting the motion to dismiss. Polchow, PCB 15-157 (Mar. 3, 2016). The Board dismissed the alleged violations of four sections of the Act because they cannot be violated: Sections 3.115, 3.125, and 3.270 (definitions) and Section 8 (purpose of air pollution Title) of the Act. *Id.*, slip op. at 2; 415 ILCS 5/3.115, 3.125, 3.270, 8 (2016). The Board also dismissed the alleged violation of Section 9(f) because Mr. Polchow did not plead any facts to support a Section 9(f) violation. Polchow, PCB 15-157, slip op. at 3-4 (Mar. 3, 2016). The Board denied the Village's motion to dismiss the alleged violations of Sections 9(a) and 9(c). *Id.* at 5.

A hearing (Tr.) was held before Hearing Officer Carol Webb on May 1, 2018 in Danville, Illinois. Mr. Polchow, Sean McAllister (a Village employee), and Aaron Warren (the Village president) testified at the hearing. Mr. Polchow offered two exhibits at hearing (Comp. Exh.), both of which were admitted. The Village offered six exhibits at hearing (Resp. Exh.), all of which were admitted. Following the hearing, the Board did not receive any public comments. 35 Ill. Adm. Code 101.628(c). Mr. Polchow filed a post-hearing brief on August 30, 2018 (Comp. Br.) and the Village filed its response brief on September 25, 2018 (Resp. Br.).

### FACTS

The Village owns a public works property located on the west side of town in Vermilion County. Mr. Polchow testified that the site is located on the east side of town (Tr. at 13), but the preponderance of the evidence demonstrated that the site is located on the west side of town (Tr. at 87; Resp. Exh. E at 4). As a courtesy to its residents, the Village offers landscape waste disposal at the public works site. Residents are directed to drop off conforming wastes outside the locked fence located on the property. Tr. at 68; Reply Br. at 2. Once enough waste has accumulated, a public works' employee sorts the waste to remove any non-conforming items like trash and electronics. The non-conforming items are placed in the bed of a pickup truck and hauled off for disposal elsewhere. Tr. at 68-69, 83. The remaining items, namely tree branches, shrubs, grass clippings and the like, are gathered in a pile and dragged inside the fenced in area using a backhoe. Tr. at 72-73, 83. When the wind conditions are favorable (*i.e.*, the wind blowing towards the west, away from town), a public works employee uses a propane torch to ignite and burn the landscape waste. Tr. at 74-75, 78-79, 87.

Mr. Polchow, a Village resident, lives near the public works site. Mr. Polchow occasionally visits the site. Mr. Polchow testified that, during these visits, he witnessed Village employees burning items beyond landscape waste such as "rubber shoes, aerosol cans,

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<sup>1</sup> The complaint references photos without attaching them. Compl. at ¶¶4, 9, 10. Because the complaint is almost identical to the amended complaint filed in Polchow v. Warren and McAllister, PCB 14-112 (Oct. 17, 2014), the Board incorporated those attachments into this proceeding. 35 Ill. Adm. Code 101.306.

chemicals, cans, and plastic.” Tr. at 14-16. According to Mr. Polchow, the Village does not sort the deposited items before setting them on fire. *Id.*

## **DISCUSSION**

### **Burden of Proof**

In enforcement proceedings before the Board, the burden is on the complainant to prove that respondent violated the Act or the Board’s rules. *See* 415 ILCS 5/31(e) (2016). The burden of proof is by a preponderance of the evidence. Rodney B. Nelson v. Kane Cty., PCB 94-244, slip op. at 4 (July 18, 1996) (*citing* Lefton Iron & Metal Co. v. City of East St. Louis, PCB 89-53, slip op. at 3 (Apr. 12, 1990)). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Rodney B. Nelson, PCB 94-244, slip op. at 4 (*citing* Industrial Salvage Inc. v. Cty. of Marion, PCB 83-173 (Aug. 2, 1984)). As the complainant, Mr. Polchow therefore has the burden of proving that the Village violated Sections 9(a) and 9(c) of the Act.

### **Statutory Authorities**

As relevant here, Section 9(a) of the Act prohibits causing, threatening, or allowing the discharge or emission of any contaminant into the environment that causes or tends to cause air pollution in Illinois. *See* 415 ILCS 5/9(a) (2016). The Act defines “contaminant” as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2016). “Air pollution” is defined as “the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.” 415 ILCS 5/3.115 (2016).

Section 9(c) of the Act (415 ILCS 5/9(c) (2016)) prohibits the open burning of refuse. “Open burning” is “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.305 (2016). “Refuse” is defined as “waste.” 415 ILCS 5/3.385 (2016). The Act defines “waste” as “any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, . . .” 415 ILCS 5/3.535 (2016).

Section 9(f) provides in part that “[t]his Section shall not limit the burning of landscape waste . . . at sites provided and supervised by any unit of local government, except within any county having a population of more than 400,000.” 415 ILCS 5/9(f) (2016) (emphasis added). The Act defines “landscape waste” as “all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees.” 415 ILCS 5/3.270 (2016).

## Alleged Violations

### Section 9(a)

Mr. Polchow's Section 9(a) claim is premised on smoke generated from the burning of materials at the Village's public works property allegedly causing air pollution. To establish a violation of Section 9(a), Mr. Polchow must show the smoke either: (1) caused injury to human, plant or animal life, to health, or to property; or (2) unreasonably interfered with enjoyment of life or property.

Mr. Polchow testified that, prior to filing his complaint, he frequently visited the public works site for "years," with visits occurring "every time [the Village] had a fire." Tr. at 14-15. He indicated that he witnessed the Village burning waste each month from May through September of 2014, and during the summer or fall months of 2013. Tr. at 15. These fires, he continued, would smoke "for days." Tr. at 18. Mr. Polchow testified that, due to shifting winds, this smoke would often end up on the opposite side of town, moving eastward towards town. Tr. at 17, 35. Photos taken by Mr. Polchow were admitted into evidence to purportedly show large amounts of smoke blowing east towards the town. *See* Comp. Exhs. C (specifically, "C.61"); Tr. at 35.

Mr. Warren testified on behalf of the Village. He testified that burning landscape waste at the public works site is a rare event occurring two to three times per year. Tr. at 87. He added that the wind must be blowing away from town, towards the west before starting a fire. *Id.* Mr. McCallister also testified that the Village only burns about twice a year. Tr. at 78. He noted that before he burns waste at the site, he checks the wind conditions. Tr. at 78-79. Like Mr. Warren, he testified that the wind must be blowing towards the west. Tr. 78. The area to the west of the town is mainly farmland. Tr. at 79. Both Mr. Warren and Mr. McCallister indicated that a Village employee is present to monitor the fires, which are extinguished before the employee leaves for the day. Tr. 70, 87.

It is uncontested that the Village burns landscape waste at its public works site, generating some amount of smoke through these burns. The public works site exists for this very reason—to burn landscape waste. The resulting smoke is expected; all fires create smoke. What is contested is the frequency and duration of these burns, and the location, amount, and effects of the resulting smoke. Based on the record, Mr. Polchow did not demonstrate by a preponderance of the evidence that the Village burns waste more than a few times per year. Given that the Village infrequently burns landscape waste coupled with its precautions to limit burns when wind conditions are favorable, any effect on the residents seems minimal at best. An inspection by the Illinois Environmental Protection Agency (Agency) indicated that "burning of landscape waste, or even minor amounts of CCDD [clean construction or demolition debris], will not cause widespread contamination." Resp. Exh. E at 4. The fact that the Village generates smoke on occasion is insufficient to prove that it actively pollutes the air. Causing or releasing a contaminant into the air, without more, is insufficient to prove a Section 9(a) violation for air pollution.

On this record, the Board cannot find that the Village violated Section 9(a) of the Act. Regardless of when or how often the Village burns waste, Mr. Polchow failed to prove that the smoke has (1) caused injurious effects to life, health, or property or (2) unreasonably interfered with the enjoyment of life or property. The Board analyzes the evidence under each of these two types of air pollution below.

Under the first category of air pollution, evidence to support a finding based on injury to life, health, or property is absent from the record. Mr. Polchow did not introduce evidence that identifies any adverse health effects resulting from the smoke generated by the Village at the public works site. Nor did Mr. Polchow introduce evidence to support a finding that injury to human, plant, or animal life or to property resulted from the Village's activities. Outside of Mr. Polchow's conclusory statements that the smoke has forced animals to leave the area, that smoke has affected animals, insects and plants, and that it has caused "several effects" on those within the community, including health effects, the evidence is lacking. Tr. at 21, 23-24. No other witnesses, for example, corroborated Mr. Polchow's testimony. The Board concludes that this testimony alone does not prove injury to life, health, or property for purposes of Section 9(a).

Under the second category of air pollution, Mr. Polchow must prove, by a preponderance of the evidence, that the smoke generated by the Village unreasonably interfered with the enjoyment of life or property. Merely showing some sort of interference is not enough; the interference must be "substantial," which excludes "trifling inconvenience, petty annoyance and minor discomfort." Trepanier v. Speedway Wrecking Co., PCB 97-50, slip op. at 7-8 (Jan. 6, 2000) (*citing* Processing & Books, Inc. v. PCB, 64 Ill. 2d 68, 77, 351 N.E.2d 865, 869 (1976)).

The Board is unable to find, on this record, that the smoke interfered with the enjoyment of life or property, let alone unreasonably interfered. There is no evidence of interference based on enjoyment of life. As for interference with property, Mr. Polchow testified that while visiting a friend's apartment one day, smoke and ashes from a Village burn blew through the apartment complex. Tr. at 19. He did not provide information regarding the approximate date of this occurrence or how long the smoke persisted. Outside of this testimony, Mr. Polchow did not claim any other interference with property. While it is possible that smoke from the Village's site might have blown towards town due to shifting winds and, conceivably, entered one's property, the Board concludes that Mr. Polchow's unsubstantiated testimony is insufficient to establish interference with enjoyment of property. Even if the Board were persuaded by Mr. Polchow's testimony, a single instance of some smoke entering an apartment complex without specifics regarding the date or duration does not prove a *substantial* interference. His uncorroborated testimony describes a petty annoyance or minor discomfort. The Board finds the evidence insufficient to establish an interference with enjoyment of life or property.

Based on the above analysis, the Board finds that Mr. Polchow has not met his burden of proving the Village caused air pollution in violation of Section 9(a).

### **Section 9(c)**

Mr. Polchow's Section 9(c) claim is based on the alleged open burning of refuse by the Village at its public works site. "Open burning" includes "the combustion of any matter in the

open.” 415 ILCS 5/3.305 (2016). Under the Act, “refuse” carries the same meaning as “waste.” 415 ILCS 5/3.385 (2016). Notably, “waste” includes “garbage” and “other discarded material.” See 415 ILCS 5/3.535 (2016).

With its burn operation at the public works site, the Village plainly combusted matter in the open within the meaning of “open burning.” And, the Village does not dispute that it burned “landscape waste” as defined in the Act. See 415 ILCS 5/3.270 (2016). However, although “landscape waste” is generally considered a subset of “waste,” the open burning of landscape waste is expressly *not* limited by Section 9 if that burning takes place at local government sites under circumstances like those present here, as discussed in the next part of this opinion. See American Tree Service, Inc. v. IEPA, PCB 94-43, slip op. at 14-15 (Dec. 14, 1994); see also City of Lake Forest v. PCB, 146 Ill. App. 3d 848, 855-57(2d Dist. 1986). Consequently, to establish a Section 9(c) violation for the open burning of refuse, Mr. Polchow must prove that the Village burned discarded material other than landscape waste at the public works site.

Mr. Polchow testified that he witnessed Village employees pouring chemicals on the waste pile to ignite a fire. Tr. at 14, 18. He further testified that he witnessed Village employees burning “rubber shoes, aerosol cans, chemicals, cans, and plastic” commingled with landscape waste. Tr. at 14-16. Photos taken by Mr. Polchow were admitted in the record. See Comp. Exhs. A, C. Mr. Polchow testified that the first three photos labeled “Exhibit C” are evidence of “plastics” burned by the Village. Tr. at 32-33. Other photos admitted purport to show plastic pots that the Village employees failed to remove prior to placing the items inside the fenced burn area. See Comp. Exh. A; Tr. at 45.

Mr. McAllister and Mr. Warren refuted these statements. Both testified that the Village actively sorts items deposited outside the locked fence before pulling the landscape waste inside the fenced area to burn. Tr. at 68-69, 83, 90. Investigations by the Agency found no violations of the Act at the public works’ site. Tr. at 81; see also Resp. Exhs. A-E. Mr. McAllister testified that when landscape waste is burned, the fire is ignited using a propane torch and without the use of accelerants. Tr. at 74; see Resp. Exhs. E at 5 (Agency inspector finding no evidence of organic constituents or accelerants used at the burn site).

Based on the record before it, the Board cannot find that the Village violated Section 9(c) as alleged by Mr. Polchow. Mr. Polchow’s testimony and exhibits fail to demonstrate that the Village, more likely than not, burned anything other than landscape waste at its public works site.

Photos admitted by Mr. Polchow do not establish that the burn pile consisted of anything other than landscape waste. Many of the photos depict large piles of branches and leaves entirely consistent with the definition of landscape waste. See Comp. Exh. A. Photos purporting to evidence plastic burned or to-be-burned at the site are unhelpful. The black and white photos (admitted as Comp. Exh. C) make it difficult to determine the nature of these items. Mr. Polchow too struggled with these photos. When presented with these photos at hearing, despite having taken them, Mr. Polchow was unable to identify these items. Tr. at 31-32. Aside from their unknown nature, the location of these items in relation to the burn area is unclear. Furthermore, the photos showing plastic planters intermingled with branches appear to depict

items that have yet to be sorted and burned. *See* Comp. Exh. A. The Board finds that these exhibits fail to support a finding that the Village burns non-landscape waste.

The Village's public works site exists as a courtesy to its residents. It deters residents from burning waste on their own. Landscape waste that would otherwise end up in an overcrowded landfill can safely be burned at the site. Some residents abuse this privilege. Disposing of landscape waste mixed with trash and other non-conforming waste is not unusual; the locked fence was erected to combat this very issue. Tr. at 68. Because residents can drop off landscape waste outside the fenced area at any time, and despite the "yard waste only" sign onsite (*see* Resp. Exh. F), some non-conforming wastes are anticipated. An Agency investigation found no evidence of accelerants or organic constituents that result from burning plastic. Resp. Exh. E at 5.

Based on the testimony and exhibits submitted, the Board concludes that Mr. Polchow has not met his burden of proving that the Village burned items other than landscape waste at its public works site. The Board therefore finds that the Village did not violate the Section 9(c) open burning prohibition.

### **Section 9(f)**

Even if the Board were to find that a violation of either Section 9(a) or 9(c) was established by Mr. Polchow, Section 9(f) provides in part that "[t]his Section [*i.e.*, Section 9] shall not limit the burning of landscape waste . . . at sites provided and supervised by any unit of local government, except within any county having a population of more than 400,000." 415 ILCS 5/9(f) (2016). It is uncontested that the Village burns landscape waste at a site it provides and supervises. As for the population of Vermilion County, the Board's procedural rules allow the Board to take notice of generally recognized facts outside the record. *See* 35 Ill. Adm. Code 101.630 ("Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board."). "Judicial notice may be taken of factual evidence where the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." Bobber Auto Truck Plaza v. Dept. of Revenue, 143 Ill. App. 3d 614, 618 (5th Dist. 1986) (*citing* Vulcan Materials Co. v. Bee Constr. Co., 96 Ill. 2d 159, 166 (1983)). Population estimates are frequently judicially noticed facts and easily accessed through the U.S. Census Bureau's website. *See, e.g.*, DiModica v. Dept. of Empl't Sec., 164 Ill. App. 3d 445, 448 (5th Dist. 1987); *see also* Sys. Dev. Serv. v. Haarmann, 389 Ill. App. 3d 561, 575 (5th Dist. 2009).

According to the U.S. Census Bureau, the population of Vermilion County was estimated at 81,625 people in 2010 and at 77,909 people in 2017.<sup>2</sup> These population estimates are far below 400,000. The Board takes official notice of Vermilion County's population estimates by U.S. Census Bureau. Because the Village, a unit of local government, burns landscape waste at

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<sup>2</sup> Census Bureau QuickFacts. (2019). *U.S. Census Bureau QuickFacts: Vermilion County, Illinois*. [online] Available at: <https://www.census.gov/quickfacts/fact/table/vermilioncountyillinois/PST045218>

its public works site, and the Village of Rankin is within a county with a population of less than 400,000, the Village's burn operations are exempted from Sections 9(a) and 9(c) of the Act.

### CONCLUSION

For the reasons stated above, the Board finds that Mr. Polchow failed to meet his burden of proving the Village violated Section 9(a) or 9(c) of the Act as alleged in his complaint.

This opinion and order constitute the Board's findings of fact and conclusions of law.

### ORDER

Based on this record, the Board finds that the Village did not violate Section 9(a) or 9(c) of the Act. Therefore, the Board dismisses this case and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2016); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

<b>Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court</b>	
<b>Parties</b>	<b>Board</b>
William P. Drew III, Inc. Attn: William P. Drew III 1063 East 9th Street Lockport, Illinois 60441 billdrew@sbcglobal.net	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Davis and Delanois, P.C. Attn: Andrew C. Mudd 28 West North Street Suite 220 Danville, Illinois 61832 amudd@davis-delanois.com	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 28, 2019, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The letters are fluid and connected, with a large initial "D" and "B".

Don A. Brown, Clerk  
Illinois Pollution Control Board