

ILLINOIS POLLUTION CONTROL BOARD  
October 27, 1994

SANGAMON COUNTY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 93-42
	)	(Administrative Citation)
NORMAN CLARK and BRENDA BERTRAND,	)	
	)	
Respondents.	)	

DISSENTING OPINION (by R.C. Flemal and J. Theodore Meyer):

We dissent from the decision of the majority. We find that the record clearly establishes that open burning was conducted by the respondents, and accordingly that the Board should have upheld Sangamon County's determination of open burning.

The testimony of Sangamon County's inspector, Mr. Allan Alexander, is that the burn pile contained remains of construction materials:

Q: When looking at the burn piles did you observe nails within these piles?

A: Yes, I did.

Q: Did you observe pieces of burnt dimensional lumber in these piles?

A: Yes, I did:

Q: Was this just landscaping waste that was burned on the property?

A: No, it was not. (Tr. at 44-45.)

It is well established that burning of construction wastes in the manner here evidenced constitutes open burning under the meaning of the Act. (See Illinois Environmental Protection Agency v. Illinois Pollution Control Board (5th Dist. 1991), 219 Ill.App.3d 975, 579 N.E.2d 215, 162 Ill.Dec. 401.)

The majority apparently does place reliance on its inability to identify within the photographic exhibits the nails and lumber testified to by Mr. Alexander. It is, in fact, customary for the complainant in an administrative citation action before the Board to present photographic evidence as part of its case-in-chief. The majority fails, however, to distinguish what is customary from what is necessary. It is not necessary that the photos show anything particular, or that there even be photos, to sustain a determination of violation if there is clear, independent

evidence that the violation occurred. Here our clear, independent evidence is Mr. Alexander's testimony.

Even respondent Norman Clark, when first questioned about the burning of construction wastes, equivocates about so doing:

Q: You never burnt any dimensional lumber?

A: Not on purpose. (Tr. at 31.)

Finally, it is compelling that the hearing officer, who personally heard and observed both Mr. Alexander's and Mr. Clark's testimony, should explicitly question Mr. Clark's credibility on the open burning issue. (Tr. at 53-54.) It is indeed unusual that a hearing officer feels compelled to question the credibility of any witness. That it was done here, and here only on the open burning issue, removes from our minds any doubt whatsoever that the Board should have sustained the open burning count.

We agree with the majority's findings that a violation has not been demonstrated with respect to the second count, that of causing or allowing open dumping that resulted in litter.

For these reasons, we dissent.




Ronald C. Flemal  
Board Member



J. Theodore Meyer  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 27<sup>th</sup> day of (October), 1994.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board