

ILLINOIS POLLUTION CONTROL BOARD

July 1, 1993

SANGAMON COUNTY DEPARTMENT OF PUBLIC HEALTH,)	
)	
Complainant,)	
)	
v.)	AC 92-79
)	Docket A & B
LEE HSUEH (SPRINGFIELD/HSUEH))	(Administrative Citation)
)	(SCDPH-92-AC-20)
Respondent.)	

MR. ROBERT SMITH, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF COMPLAINANT;

MR. LEE HSUEH APPEARED PRO SE.

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

This matter comes to the Board on an Administrative Citation filed by the Sangamon County Department of Public Health (County) pursuant to the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et. seq.). The citation was filed on November 12, 1992, and alleges that respondent, Lee Hsueh, the owner of property in Sangamon County violated Sections 21(p)(1) and 21(p)(3) of the Act by causing or allowing open dumping of wastes that resulted in litter and open burning.

Mr. Hsueh filed a petition for review with the Board on December 14, 1992. Hearing was held February 8, 1993 in Springfield, Illinois. Members of the public attended the hearing. No briefs were filed in this matter.

BACKGROUND

On October 29, 1992, Jerry Ferguson, Waste Management Specialist with the Sangamon County Department of Public Health, inspected Mr. Hsueh's property located on West Jefferson Street in Springfield, Illinois. The property is a heavily wooded area on a sharp, steep hill with a lot of weed growth. (Tr. at 23.) The property consists of 6.5 acres located behind some apartment buildings. (Tr. at 117.)

Upon inspecting the property, Mr. Ferguson observed two deteriorating car batteries. (Tr. at 14, Exh. 5.) He also observed materials piled on the ground among ashes and other burnt debris consisting of roofing shingles, some bed springs and some metal strapping. (Tr. at 14, Exh. 5.) In several others spots, Mr. Ferguson noticed piles of debris including paint cans, a buried 55 gallon drum, lumber, aluminum scraps and roofing shingles. (Tr. at 15, Exh. 6 & 7.) He also observed unlicensed,

inoperable vehicles on the property. (Tr. at 16, Exh. 8.) Mr. Ferguson did not observe anyone burning any materials. (Tr. at 32.)

The inspection was in response to an investigation that was forwarded to the County from the Illinois Environmental Protection Agency (Agency). (Tr. at 11.) The Agency issued an Administrative Warning Notice to Mr. Hsueh in April of 1991. (Tr. at 11, Exh. 3.) This notice instructed Mr. Hsueh to clean up his property before May 28, 1991. (Tr. at 11, Exh. 3.) Mr. Hsueh denies receiving the Administrative Warning Notice but admits he did receive a letter from the Agency requiring him to clean up the area. (Tr. at 112.) In response to this letter, Mr. Hsueh hired a tenant to remove debris from the area in April of 1991. (Tr. at 102.) The tenant removed several truckloads of debris from the property in April of 1991. (Tr. at 102.)

Mr. Hsueh does not contest that the items shown in the photos were on his property at the time of the inspection. (Tr. at 113.) However, he notes that the weeds grow to over five feet tall making it difficult to see any debris. (Tr. at 78.) Ava Pellizzari, a tenant of Mr. Hsueh, testified that the pile of burned material has been on the property for at least four years. (Tr. at 85.) Mr. Hsueh introduced a series of photographs taken on January 24, 1993, to show that his property was cleaned up after receiving the citation. (Tr. at 94, Exh. 10 thru 30.) In December of 1992, Mr. Hsueh wrote to the County, informing them that he had cleaned up the property and requesting reinspection to see if any additional work was needed. (Tr. at 34, Exh. 9.) Mr. Hsueh argues that he cannot have the unlicensed vehicles towed away because he is not the owner of the vehicles. (Tr. at 28.)

Mr. Hsueh argues that he cooperated with the Agency and cleaned up the property when he was first warned of the problem in 1991. (Tr. at 117.) He maintains that the remaining debris is very little compared to what was hauled away in 1991. (Tr. at 117.) He contends that due to the incline on the property it is difficult to remove debris from the area. He also notes that due to the size of the property and the growth of vegetation in the area, it is difficult to see the debris. (Tr. at 117.) Mr. Hsueh also notes that the items are not his and he did not dump them at the site. (Tr. at 117.) He believes that some of the items have been there for many years. (Tr. at 117.) He further argues that the County did not consider the history of the site before issuing the citation. Mr. Hsueh notes that he had contacted the Agency to reinspect the property. (Tr. at 117.) He also notes that he assumed the clean up was satisfactory because he did not hear otherwise from the Agency. (Tr. at 117.)

DISCUSSION

Mr. Hsueh argues that he has cleaned up the property subsequent to the issuance of the citation. However, the Board has previously held that post-citation activities of the citation recipient are not material to the Board's review pursuant to Section 31.1(d)(2) of the Act. (In the matter of: Lincoln Chamber of Commerce (May 25, 1989), AC 89-26.) 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.) The issue before the Board is whether the property on the date of the inspection shows a violation of the Act.

Section 31.1 of the Act provides that the prohibitions specified in "Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in this Act." Section 21(o) of the Act applies to sanitary landfills permitted under the Act while Section 21(p) applies to all dump sites. The administrative citation issued against Mr. Hsueh alleges violation of subsection (1) and (3) of Section 21(p). Section 21(p) 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;

* * *

3. open burning;

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."

These sections of the Act establish 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 unless, "...the person appealing the citation has shown that the violation resulted from uncontrollable circumstances." (Section 31.1(d)(2) of the Act.) Therefore, the initial inquiry in this

case is whether Mr. Hsueh's conduct constitutes causing or allowing "open dumping."

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." Section 3.31 of the Act defines "refuse" as "waste." Section 3.53 defines "waste" as, inter alia, "garbage ... or other discarded material... ."

The photos of the site taken by, Mr. Ferguson clearly show the consolidation of refuse. The photos show piles of waste on the property. Mr. Hsueh admits that refuse was present on the property at time of the inspection.

The Board must next determine if the record supports a conclusion that the open dumping resulted in litter. In St. Clair County v. Arthur Fields (August 22, 1991), AC 90-64, the Board adopted the definition of litter as found in the Litter Control Act. (415 ILCS 105/3 (1992).) The Litter Control Act defines litter as:

any discarded used or unconsumed substance or waste.
 "Litter" may include but is not limited to, any
 garbage, trash, refuse, debris, rubbish, grass
 clippings, . . . abandoned vehicle. . .

(Id.)

The pictures of the site clearly show litter in several locations on the property. The litter is comprised of discarded materials including roofing materials, lumber, and other miscellaneous items.

Having found that open dumping resulting in litter occurred at the site, the Board must determine whether Mr. Hsueh "caused or allowed" the open dumping. Mr Hsueh contends that he did not dump the material or allow anyone else to dump material at the site. However, the Board has previously held that "allow" includes present inaction on the part of the landowner to remedy a previously caused violation. (EPA v. Robert Wheeler (January 10, 1991), AC 90-42; EPA v. A.J. Welin (May 13, 1982), PCB 80-125, 47 PCB 07.) The Board has held that passive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. (EPA v. Dobbeke et al. (August 22, 1972), PCB 72-130, 5 PCB 219.) In Freeman Coal Mining Corp. v. IPCB (3rd Dist. 1974), 21 Ill. App. 3d 157, 313 N.E.2d 616, the court stated that the Act is malum prohibitum and no proof of guilty knowledge or mens rea is necessary for 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" open

dumping in that the owner allows the illegal situation to continue.

Based on the facts presented in this case and the legal principles outlined by this Board and the Courts, we conclude that Mr. Hsueh did "cause or allow" the open dumping described in this proceeding which resulted in litter. Therefore, Mr. Lee Hsueh has violated Section 21(p)(1) of the Act.

The above violation is based on the presence of refuse and the abandoned vehicles on Mr. Hsueh's property. However, the Board notes that the presence of either refuse or the abandoned vehicles would be sufficient to support a finding of violation.

Concerning the allegation of open burning, the operative provision of the Act, Section 31.1(b), provides:

Whenever Agency personnel or personnel of a unit of local government to which the Agency has delegated its functions. . . on the basis of direct observation, determine that any person has violated any provision...

(415 ILCS 5/31.1(b).)

The statute by its terms does not require that the fire itself be observed, but instead that direct observation support a conclusion that fire occurred at the site. Thus, the Board has found that the Act clearly allows the complainant to prevail on a claim of open burning even where the inspector does not specifically see the burning material or smoke during the inspection. (IEPA v. Gordon (February 7, 1991), AC 89-165.) However, the County must make some showing that the burning did occur at the facility issued the administrative citation. (Id.) The question is whether such a factual showing has been made in this particular proceeding.

Based on the evidence presented, the Board concludes that complainant has not demonstrated that open burning has occurred on the respondent's property. While the photos taken during the inspection clearly show burnt and charred materials there is nothing in the photo to indicate that the materials were burned on site. There is no indication of burning on the surrounding vegetation. The vegetation is growing among the burnt debris. Further, Mr. Ferguson did not supply any testimony concerning his observations to lead this Board to conclude that the material was burned on site. Mr. Ferguson did state that he could not determine when the material had been burnt. (Tr. at 32.)

The final question the Board must consider is whether Mr. Hsueh has shown that the violation 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 violation would be found and no penalty imposed. (Section 31.1(d)(2) of the Act). The Board finds that Mr. Hsueh has not presented any uncontrollable circumstances.

Mr. Hsueh argues that he is unable to remove the abandoned vehicles from the property because a towing company will not tow the vehicles away without the title. (Tr. at 28.) He asserts that he has provided the County with the names of the owners of the vehicles but the County has not taken any action against the owners. (Tr. at 28.)

The Board finds that Mr. Hsueh has not proven his inability to remove the vehicles is an uncontrollable circumstance. The Board notes that Mr. Hsueh has not presented any documentary or testimonial evidence to support his verbal assertion that he cannot have the vehicles removed from his property. In addition, he has not identified if his efforts to remove the vehicles occurred prior to or after the issuance of the administrative citation. The Board also notes that Mr. Hsueh did not present any other actions that he pursued to remove the vehicles or prevent them from being abandoned on his property.

The Board notes that the legislature specifically included abandoned vehicles in the definition of litter. If Mr. Hsueh's assertion, that title to the vehicle is required before this Board can require removal of the vehicle in an administrative citation proceeding, is correct, the removal of abandoned vehicles would be extremely hindered. In a similar manner, Mr. Hsueh cannot shift the burden of accomplishing clean up activities to the government by providing them with the names and phone numbers of purported owners of abandoned materials.

The difficulties that Mr. Hsueh encountered with the Agency and the County do not amount to uncontrollable circumstances. The provisions of the Act do not require that a warning be given prior to issuing an administrative citation. Also the difficulty of removing debris from this site due to the incline and the growth of vegetation does not present an uncontrollable circumstance.

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) 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; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government.

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

Respondent will therefore be ordered to pay a civil penalty of \$500 based on the violation as herein found. For purpose 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 County. The Clerk of the Board and the County will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Mr. Hsueh. The County is also instructed to indicate to whom payment of the hearing costs is to be directed. (See Sangamon County v. Gerald Miller (June 3, 1993), AC 92-37.) 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. The Board hereby finds that Lee Hsueh was in violation Section 21(p)(1) of the Environmental Protection Act on October 27, 1991 by causing or allowing open dumping that resulted in litter on his property in Springfield, Illinois.
2. Lee Hsueh shall pay the sum of five hundred dollars (\$500) within 30 days of the date of this order. Such payment shall be made by certified check or money order payable to:

James D. Stone, Director
Sangamon County Department of Public Health
200 South 9th Street
Springfield, IL 62701

Lee Hsueh shall also write his Federal Employer Identification Number or Social Security Number on the certified check or money order.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003 (1992)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

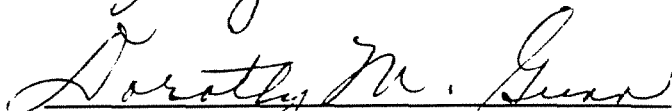
3. Docket A in this matter is hereby closed.
4. Within 30 days of this order, the County shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Lee Hsueh. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Lee Hsueh. Such filings shall be entered in Docket B of this matter.
5. Lee Hsueh is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this order.

IT IS SO ORDERED.

J. Anderson concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of July, 1993, by a vote of 4-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board