

ILLINOIS POLLUTION CONTROL BOARD
September 13, 1989

COUNTY OF DUPAGE,)	AC 88-76, Docket A & B
)	No. 88 CD 278
Complainant,)	
)	and
v.)	
)	AC 88-77, Docket A & B
E & E HAULING, INC.)	No. 88 CD 279
(MALLARD LAKE LANDFILL),)	
)	
Respondent.)	

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

GRETТА TAMELING APPEARED ON BEHALF OF THE OFFICE OF THE STATE'S ATTORNEY FOR DUPAGE COUNTY;

RAYMOND T. REOTT AND ROBERT P. ZAPINSKI, OF JENNER AND BLOCK, APPEARED ON BEHALF OF E & E HAULING, INC.

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

This matter comes before the Board upon petitions for review filed in each of the above-captioned cases by E&E Hauling, Inc. ("E&E") on August 2, 1988. In each case, an administrative citation was served on E&E on July 14, 1988, pursuant to the authority vested in the Illinois Environmental Protection Agency ("Agency") and delegated to DuPage County ("Complainant"). Ill. Rev. Stat. 1987, Ch. 111 $\frac{1}{2}$, par. 1004(r) and 1031.1.

The record indicates that the parties had requested consolidation of these two cases. However, the record does not contain any motion to consolidate filed with the Board. Since the parties are identical, the parties have essentially treated the cases as consolidated at hearing and in their briefs, and the issues are largely similar, the Board will consolidate these two cases for decision solely as a practical matter.

A hearing was held on December 8, 1988 for both cases; no members of the public attended. The Agency filed a brief in lieu of a closing argument on May 8, 1989. E&E filed a closing brief on June 19, 1989.*

* The Agency's closing arguments is cited as "Agency cl. arg.". E&E's closing argument is cited as "Resp. cl. arg.".

Both administrative citations were issued to E&E as operator of a sanitary landfill commonly known as Mallard Lake Landfill. However, the administrative citations were issued for inspections occurring on two different days, May 20, 1988 (AC 88-76) and June 16, 1988 (AC 88-77), by DuPage County inspectors.

May 20, 1988 Inspection

On May 20, 1988, Steven K. Dunn of DuPage County, inspected the Mallard Lake Landfill operated by E&E. Mr. Dunn conducted the inspection between 9:45 a.m. and 11:02 a.m. by an on-site inspection which included walking the site and interviewing personnel. (A.C. 88-76)

Based on Mr. Dunn's observations, Complainant issued an administrative citation stating that E&E had operated the Mallard Lake Landfill in a manner which resulted in the following condition:

The existence of uncovered refuse remaining from any previous operating day or at the conclusion of any operating day in violation of Ill. Rev. Stat. (1987), Ch. 111 $\frac{1}{2}$, par. 1021 (p)(5). (A.C. 88-76)

Complainant submitted photographs taken during the inspection as evidence of the uncovered refuse. (Comp. Ex. 1, photos 8-11). Complainant further cites testimony by Mallard Lake Landfill's manager in which he stated that the last waste was deposited in the area during the last week of April. (R. at 190). Complainant subsequently concludes that "the uncovered refuse discussed and photographed by Inspector Dunn was clearly refuse from a time previous to the inspection date of May 20, 1988." (Agency Cl. arg. at 2).

E&E responds that the area depicted by Mr. Dunn "was being used as part of a road over which heavy equipment was hauling dirt for use as cover material in other areas of the landfill." (Resp. Cl. arg. at 3, R. at 191, 193). E&E argues that:

the combination of the wet weather when the refuse was first deposited at the landfill and the subsequent driving of heavy equipment loaded with dirt over the area created instability in this defined and limited area causing the refuse to deflect and push up through the soil cover.

(Resp. Cl. arg. at 4, R. at 193-195)

E&E further argues that it would have been "extremely difficult" and "impractical" to have kept that area "free of

every piece of uncovered refuse." (Resp. Cl. arg. at 4). E&E also states that the placement of additional cover was "not justified" due to the "limited amount" of uncovered refuse and because the "process would simply repeat itself the next day when the equipment drove over the area again." (Resp. Cl. arg. at 4,5; R. at 205-206). Finally, E&E argues that the "de minimus" conditions portrayed in Complainant's photographs could not have been prevented and are "inherent in the operation of the landfill." (Resp. Cl. arg. at 6).

Uncovered refuse is indeed apparent from the photographs submitted by Complainant. (Comp. Ex. 1, photos 8-11). It is uncontested that the refuse in the photos was left uncovered from at least the previous operating day, if not longer. (Agency Cl. arg. at 2; Resp. Cl. arg. at 3; R. at 190, 206). Thus, the Board finds that the evidence demonstrates uncovered refuse remained from a previous operating day at Mallard Lake Landfill in violation of Section 21(p)(5) of the Environmental Protection Act ("Act").

Under the Act, if the Board finds that the alleged violation has occurred it must adopt an order so stating and impose the statutory penalty, unless it finds that the violation resulted from uncontrollable circumstances. E&E is not claiming that the uncovered refuse remained from a previous operating day as a result of uncontrollable circumstances. Rather, E&E asserts that it is being held to an "unreasonably high standard of performance." (Resp. Cl. arg. at 2). However, during the hearing E&E's landfill manager essentially admitted that the refuse was not properly covered, as he testified on cross examination to the following:

William Seltzer (Agency Attorney): As the site manager, are you ever satisfied with a site looking like that at a day's end? [looking at Comp. Ex. 1, photos 8,9,10]

Christopher Peters (Manager-Mallard Lake Landfill): No.

Seltzer: No. What would you usually do if you saw an area like that at the end of the day?

Peters: Apply additional cover.

(R. at 239, 240). Based on the photographs in evidence, Mr. Dunn's testimony and testimony by E&E's witnesses at the hearing, the Board finds that E&E violated Section 21(p)(5) of the Act for allowing uncovered refuse to remain from a previous operating day and that no defense for uncontrollable circumstances has been made here.

June 16, 1988 Inspection

On June 16, 1988, Steven Dunn, of the County of DuPage, again inspected the Mallard Lake Landfill operated by E&E. On the basis of his inspection, E&E was issued an administrative citation for operating the landfill in a manner which resulted in the following conditions:

- (1) The existence of uncovered refuse remaining from any previous operating day or at the conclusion of any operating day in violation of Ill. Rev. Stat. (1987), ch. 111 $\frac{1}{2}$, par. 1021(p)(5).
- (2) A failure to collect or contain litter from the site by the end of each operating day in violation of Ill. Rev. Stat. (1987), ch. 111 $\frac{1}{2}$, par. 1021(p)(12) and 35 Ill. Adm. Code, Subtitle G, Chapter I, Section 807.306.

(AC 88-77). Mr. Dunn conducted his inspection between the hours of 5:33 a.m. and 6:30 a.m. Complainant submitted photographs as evidence of the above alleged violations. (Comp. Ex. 2, photos 1-11).

Uncovered Refuse

In support of its allegation that E&E allowed uncovered refuse to remain from a previous operating day, Complainant refers to photographic evidence depicting such items as a mattress, a tire and rolled carpeting. (Comp. Ex. 2, photos 7, 9 & 10). Noting that as of the time of the inspection no refuse trucks had deposited refuse that day, Complainant argues that "the uncovered refuse testified to and photographed by Inspector Dunn must have been from a previous day's operation." (Agency Cl. arg. at 4; R. at 76, 79).

E&E responds that the area depicted in photos 3-8 of Complainant's exhibit No. 2 was "part of the turnaround area for the previous day's working face." (Resp. Cl. arg. at 7; R. at 267). E&E explains that the refuse depicted in Complainant's photos is from the refuse-hauling trucks cleaning their truck beds before leaving the landfill. (Id.). E&E further explains that since the area would again be used as a turnaround it "would have been counterproductive to apply cover to an area about to receive heavy traffic the next day." (Resp. Cl. arg. at 8; R. at 270-271).

E&E's statements concerning the refuse in the turnaround area amount to an admission that uncovered refuse remained from a previous operating day. E&E's explanations that paper pickers

could not have been used in that area, that the refuse has a tendency to stick to the clay cover material, and that there were some equipment breakdowns during various times that day do not amount to uncontrollable circumstances. Indeed, E&E has not asserted such a defense. E&E asserts that there was "nothing more which it could reasonably have done" under the "unusually difficult circumstances." (Resp. Cl. arg. at 8,9). However, the statutory defense for a violation of Section 21(p)(5) is not "unusually difficult" circumstances but "uncontrollable" circumstances under Section 31.1(d)(2).

Uncontrollable circumstances is an affirmative defense which must be proven by the party appealing the citation. It does not appear that E&E was attempting to claim that the uncovered refuse was due to uncontrollable circumstances but even if E&E is making that claim, the Board finds that this is not a situation of uncontrollable circumstances. Based on evidence submitted by the Complainant and E&E's own admissions, the Board finds that E&E operated Mallard Lake Landfill in violation of Section 21(p)(5) of the Act.

Litter

In support of the allegation that litter from a previous operating day had not been collected and contained, the Complainant submit observations and testimony of Mr. Dunn and photographic evidence. (Pet. Ex. 2, photos 9,10,11; R. at 79-83). Mr. Dunn testified at the hearing that much of the debris in photos 9,10 and 11 was wind blown litter. He also testified that the litter was from the previous day's operation since he arrived at the site before any trucks had arrived in that particular area. (R. at 80,81).

Complainant proffers two ways to distinguish between litter and uncovered refuse. Complainant first describes litter as "material resting on top of the soil with an unweathered look or untrapped, whereas uncovered refuse will be commingled with the covered material." (R. at 74). Next, Complainant suggests that litter, unlike uncovered refuse, is that which "may be removed from the working area or transported from the working area." (R. at 120). Nevertheless, Complainant argues that "the two alleged violations (i.e. daily cover and failure to collect litter) often go hand in hand because one of the benefits of applying daily cover is to prevent litter from overnight." (Agency Cl. arg. at 4).

E&E responds to the Complainant's allegations by stating that "it would have been an unsafe practice to employ paper pickers to collect the refuse in the areas indicated in photographs 9,10 and 11 of Complainant's Exhibit No. 2, because that would have required the men to be working in an area below the working face." (Resp. Cl. arg. at 10). E&E asserts that

paper pickers "could have easily been injured by debris rolling down the slope from the working face." (Id.). Finally, E&E argues that "were a landfill required to operate in a completely spotless manner, service would have to be reduced in terms of the amount of refuse accepted for dumping so as to allow the landfill's personnel to devote additional time, effort and equipment to 'cleaning' the landfill." (Resp. Cl. arg. at 11).

The Board cannot accept either argument made by E&E. The Act requires landfill operators to collect and contain litter from previous days operations; it is E&E's responsibility to do so. Neither its concern for the safety of its "paper pickers" nor its dislike of reduced operating hours amounts to a claim of "uncontrollable circumstances" as opposed to ordinary problems associated with operation of a landfill.

The Board also cannot accept the Agency's argument that litter is distinguishable from uncovered refuse by the extent to which it is "weathered" or "untrapped". It is not just a matter of how weathered a piece of refuse may be. There is a locational aspect to an administrative citation alleging a litter violation. The location of the refuse in question, not its appearance, is dispositive as to whether it constitutes "litter" within the context of Section 21(p)(12) of the Act. The Board also notes that refuse may become weathered in appearance long before its arrival at a landfill.

In this instance, Complainant's photographs and site sketch indicate the same general area for both the alleged uncovered refuse and the alleged litter violation of June 16, 1988. While the Board agrees with the Complainant that these violations often go "hand in hand", it does not agree that a violation of both can be imposed in the same locational setting.

Litter is a subspecies of refuse; the Complainant is attempting to impose two penalties for the same offense. The arguments here that attempt to distinguish the means by which uncovered refuse came to be situated in the same area of disturbed soil are not adequate proof. Absent an indication that the refuse has escaped from the general working area and been allowed to remain uncovered and uncollected at the end of each operating day, no violation of Section 21(p)(12) has been shown. The Board, therefore, does not uphold the Complainant's determination that E&E was in violation of Section 21(p)(12) of the Act.

CONCLUSION

The Board hereby upholds Complainant's determinations that E&E violated Section 21(p)(5) of the Act on May 20, 1988 and that E&E violated Section 21(p)(5) of the Act on June 16, 1988. The

Board does not uphold the Complainant's determination that E&E violated Section 21(p)(12) on June 16, 1988.

PENALTIES

Penalties in Administrative Citation actions of the type here brought are prescribed 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) or (q) 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.

Ill. Rev. Stat., 1987, ch. 111 $\frac{1}{2}$, par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of \$1,000, 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.

HEARING COSTS

This case presents an issue of how the hearing costs should be ascertained. If found to be in violation of the Act, the respondent is required to pay any hearing costs incurred by the Board and the Agency. Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1042(b)(4). However, the Act is silent as to hearing costs incurred by units of local government when they file the complaint.

In this case, DuPage County alone filed the citation. At hearing, the Agency appeared in its own behalf and the DuPage County State's Attorney appeared on behalf of DuPage County. The respondent and the Agency presented the evidence, conducted the cross-examination, and filed the only post-hearing briefs. As noted above, Section 42(b)(4) of the Act states in pertinent part:

.... any person found to have violated ... this Act shall pay a civil penalty of \$500 for each violation ... plus any hearing costs incurred by the Board and the Agency.

Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1042(b)(4). Hearing cost incurred by units of local governments when such local governments appear as Complainants in administrative citations are not mentioned. The only reference to local government is in regard to the respondent's payment of the penalty:

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

Id.

The plain meaning of this section of the Act suggests that the Board is empowered to order the payment of costs incurred only by the state (Board and Agency), not those of the unit of local government, in this DuPage County, and regardless of who files the complaint. Thus, the plain meaning of Section 42(b)(4) suggests that the Agency may recover its hearing costs in this case but that DuPage County may not.

Such a plain reading of the Act, however, does not take into account the Act's authorization of a delegation agreement between the Agency and unit of local government, DuPage County. Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1004(r). If one interprets the Act's allowance of such a delegation agreement as placing DuPage County in the position of the Agency in regard to hearing cost recovery, then how is such an interpretation applied in this case? (see AC 88-24, AC 88-33).

In any event, since it is unclear whether the Agency or DuPage County may recover their hearing costs in this matter, the Board requests that the Agency, DuPage County and E&E brief this issue before the Board's determination in Docket B. Specifically, the Board would like the Agency to answer:

Whether the delegation agreement specifically provides for the Agency to conduct the hearing and file post-hearing briefs.

In the Board's Order following this Opinion, the Board will require that both the Agency and the DuPage County submit affidavits of their hearing costs, but the Board will determine whose costs are recoverable in Docket B. The Board will consider briefs filed by October 16, 1989.

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 May 20, 1988, of Ill. Rev. Stat. 1987, Ch. 111 1/2, par. 1021(p)(5) and in violation on June 16, 1988 of Ill. Rev. Stat. 1987, Ch. 111 1/2, par. 1021(p)(5).
2. Within 45 days of this Order of September 13, 1989, Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 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, IL 62706

3. Within 45 days of this Order of September 13, 1989, Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the County of DuPage, Fund 32-206-Solid Waste Systems. Such payment shall be sent to:

County of DuPage
Solid Waste Administrator
414 No. County Farm Road
Wheaton, IL 60187

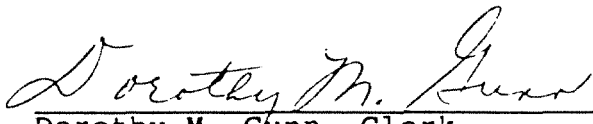
4. Docket A in this matter is hereby closed.
5. Within 30 days of this Order of September 13, 1989, the Illinois Environmental Protection Agency and the County of DuPage shall file a statement of hearing costs, supported by affidavit with the Board and with service upon E&E. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon E&E. Such filing shall be entered in Docket B of this matter.
6. Respondent is hereby given leave to file a reply/objection to the filings as ordered in 5) within 45 days of this Order of September 13, 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.

J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 13th day of September, 1989, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board