ILLINOIS POLLUTION CONTROL BOARD
June 6, 2002

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 01-42
	)	(IEPA Docket No. 171-01-AC)
ALAN SMITH,	)	(Administrative Citation)
Respondent.	)	

MICHELLE M. RYAN APPEARED ON BEHALF OF THE AGENCY; and

REINO C. LANTO, JR. APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On May 11, 2001, pursuant to Section 31.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/31.1(b) (2000) the Illinois Environmental Protection Agency (Agency) filed an administrative citation against Alan K. Smith. The Agency alleged that Smith was operating an unpermitted open dump in Urbana, Champaign County in violation of Section 21(p)(3) of the Act. 415 ILCS 5/21(p)(3) (2000).[1] The Agency sought a penalty of $1,500 for the alleged violation of the Act. The administrative citation was based on an inspection by Agency Field Inspector Kenneth Keigley on March 27, 2001.

For the reasons stated below, the Board finds that Smith has violated Section 21(p)(3) of the Act.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the filing of administrative citations (415 ILCS 5/31.1 (2000)), and Part 108 of the Board's procedural regulations explains the administrative citation process before the Board (35 Ill. Adm. Code 108 *et seq*). Administrative citations are an enforcement tool available to both the Agency and to local units of government under the Act. Administrative citations differ from enforcement actions in several respects. In particular, statutory penalties for administrative citations are set in the Act, and the Board has

[1] The Agency alleges violations of both Section 21(p)(1) of the Act (litter) and Section 21(p)(3) of the Act in its post-hearing brief. The Board will only address the alleged violation of Section (p)(3) because it was the only allegation in the original administrative citation and was the only allegation discussed at hearing.

no leeway to consider mitigating or aggravating factors in determining penalty amounts. *See* 415 ILCS 5/42(b)(4-5) (2000).

PROCEDURAL HISTORY

Smith submitted a petition for review and response to the Agency's administrative citation on June 14, 2001. On June 21, 2001, the Board issued an order stating that the petition for review must contain a notice of filing, certificate of service, and notice of appearance – none of which were included in the June 14 filing. The Board gave Smith 35 days to file an amended petition, and on July 26, 2001, Smith filed a proper amended petition. In the amended petition, Smith denied the allegations in the administrative citation and denied that he caused or allowed the open dumping of waste at the property in question. The Board subsequently accepted this matter for hearing.

The hearing in this matter (Tr.) was held on March 19, 2002, in Champaign before Board Hearing Officer Steven C. Langhoff. Keigley testified on behalf of the Agency. Larry N. Jean and Thomas J. Pilkington testified on behalf of respondent Smith, and Smith also testified. The Agency (Ag. Exh.) and Smith each offered one exhibit at the hearing. Hearing Officer Langhoff found all of the witnesses to be credible. Tr. at 61-62. The Agency filed its post-hearing brief on April 11, 2002 (Ag. Br.), and Smith filed his post-hearing brief on May 2, 2002 (Sm. Br.).

FACTUAL BACKGROUND

The property in question is commonly known to the Agency as Urbana/Alagna, Natalie. Natalie Alagna is the property owner. The Alagna property is located on North Oak Street in Urbana, 300 feet north of Interstate 74. It is about two to three acres in size and, according to Smith, is used as a recycling and salvage facility. Tr. at 8, 10, 12, 19; Ag. Exh. at 1. Smith and his son Richard Miller lease the Alagna property. They were the lessees in late 2000 and were still the lessees on March 27, 2001. Tr. at 11, 32, 50-51. Jean and Pilkington worked for Smith at the time. Tr. at 51.

Smith testified that the Alagna property was in a "horrendous condition" when he and son first leased it. At that time, the Alagna property was full of debris that had fallen out of a metal crusher in addition to an old camper, a garbage truck, some insulation, wood pallets, and other debris. Tr. at 51-52. Smith and his employees had been cleaning up the property prior to March 27, 2001. Tr. at 58. Smith had purchased steel beams and brought them to the Alagna property. Tr. at 52.

At the time of the hearing, Keigley had been an inspector with the Agency for about seven years. Tr. at 10.

Sequence of Events – March 27, 2001

On the morning of March 27, 2001, Smith directed Jean and Pilkington to use torches to cut steel beams on the Alagna property. Smith claimed that he instructed Jean and

Pilkington to "try not to have any fires." Smith then left the Alagna property. Jean and Pilkington claim that the fires started as the result of sparks from the cutting of the steel beams although they did not intend to burn anything. Tr. at 34-38, 44-45, 52-53. Jean testified that the steel beams that they were cutting appeared in one of the Agency photographs. Tr. at 37-38, 43. Jean said that nearby materials often catch fire when he is cutting steel. Tr. at 38.

An Agency employee named Darwin Fields went out to the Alagna property at about 3:00 p.m. on March 27, 2001, and advised Jean and Pilkington that open burning was occurring in violation of the Act. Tr. at 18, 38-40, 46. Pilkington testified that he and Jean offered to put the fires out. Tr. at 46. Jean testified that Fields told him to let the fires burn out if the burning out process was to take 15 to 30 minutes. Tr. at 38-40, 46-47.

Smith came back to the Alagna property at about 4:00 p.m., which was just before Fields returned there with Keigley. Tr. at 41, 47, 53-54; Ag. Exh. at 1.

Smith said that he no knowledge of the fires until he returned to the Alagna property. Tr. at 55. Upon his return, Smith told Jean and Pilkington that the fires should be put out. Tr. at 47, 54. Jean told Smith what Fields had said. Tr. at 41-42, 54. Smith again said that the fires should be put out. Tr. at 54. Nevertheless, Jean and Pilkington then allowed the piles to burn. Tr. at 46, 49. Smith said that "before we the got them out, Mr. Keigley had returned to the site (with Fields)." Tr. at 54.

Keigley's Inspection

Keigley, accompanied by Fields, then conducted an inspection of the Alagna property. Tr. at 10-11. Keigley said that during his inspection he saw a consolidation of scrap metal and other items. Tr. at 12. He also saw burning materials in two different piles. Tr. at 13-14. He said that each pile was about two feet by three feet and about four inches high. He said that the solid material in the piles looked about three feet long, three inches wide, and three-quarters of an inch thick. He could not determine if the material in the piles was wood or plastic. However, Keigley did notice some small scraps of wood in the first pile. Keigley testified that material did not appear to be "naturally occurring." He also testified that the fire did not appear to be used for cooking purposes. The photographs that he took show the burn piles and also show a metal non-operational air conditioner, sewer tiles, and "long plank looking material" near the burn piles. Tr. at 12-16, 23, 25, 26-28, 30; Ag. Exh. at 1 and at Photos 1 and 2.

At hearing, Keigley was not sure if materials that he saw burning were brought to the Alagna property from elsewhere or were part of the property when Smith became the lessee. Tr. at 23. Jean and Pilkington said that they had raked the material into two piles previous to March 27, 2001. Tr. at 42, 48. Jean testified that what Keigley identified as an air conditioner was a blower with a motor and that it was scrap metal. Tr. at 38.

STATUTORY BACKGROUND

Section 21 of the Act states, in pertinent part

No person shall

a. Cause or allow the open dumping of any waste.

* * *

p. In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

3. open burning;

* * *

Open dumping is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.24 (2000). Refuse is defined as "waste" (415 ILCS 5/3.31 (2000)), and waste includes "any garbage . . . or other discarded material . . ." 415 ILCS 5/3.53 (2000). Disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste . . . into or on any land . . . so that such waste . . . or any constituent thereof . . . may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 ILCS 5/3.08 (2000).

Open burning is defined at Section 3.23 of the Act (415 ILCS 5/3.23 (2000)) as "the combustion of any matter in the open or in an open dump."

DISCUSSION

In order to examine an allegation of open burning, the Board must first determine if the open dumping of waste has occurred.

Open Dumping of Waste

Cause or Allow

Smith points out that Phillips Petroleum Co. v. PCB 72 Ill. App. 3d 217, 390 N.E.2d 620 (2nd Dist 1979) emphasizes the control that respondents must have over a property to be held in violation of the Act. Sm. Br. at 8. Smith claims that the alleged violation was "an isolated circumstance not immediately within Respondent's control." Sm. Br. at 9.

The Agency argues that a person can cause or allow a violation of the Act without knowledge or intent. Ag. Br. at 4 citing County of Will v. Utilities Unlimited, Inc., AC 97-41, slip op. at 5 (Jul. 24, 1997) citing People v. Fiorini, 143 Ill. 2d 318, 335-336, 574 N.E.2d 612, 618 (1991).

The Agency argues that the testimony of Smith and his employees indicate that Smith had control over the Alagna property and that Smith directed the raking of material into piles. Ag. Br. at 2. The Agency claims that Smith caused or allowed the open dumping. Ag. Br. at 2.

Phillips is cited in the Fiorini decision where the Supreme Court required the respondent to have "sufficient control" over a source of pollution in order to be held in violation of the Act. Fiorini, 143 Ill. 2d 318, 346-347, 574 N.E.2d 612, 623. The Board finds that Smith had sufficient control over the Alagna property. He was one of the lessees and was directing his employees' activities at the Alagna property on the day of the alleged violation.

In addition, the Supreme Court in Fiorini also held that, generally, neither knowledge nor intent are required to find a violation of the Act. There are exceptions to this general rule (*see, e.g.,* 415 ILCS 5/45(d) (2000)) but those exceptions are not at issue here. Fiorini, 143 Ill. 2d at 335-336, 574 N.E.2d at 618.

Open Dumping

Smith claims that there is no open dumping at the Alagna property. Sm. Br. at 6. Smith claims that the Board, in determining open dumping, should only be concerned with the burning materials at the Alagna property since the only alleged violation at issue is open burning. Sm. Br. at 4.

The Board disagrees with Smith's rationale. The Board must first determine if open dumping has occurred. If open dumping has occurred, the Board must determine if that open dumping has resulted in open burning. The Board will look at the entire property in order to determine if open dumping has occurred.

The Agency argues that Smith directed his employees to rake the material into piles which constitutes the consolidation of refuse from one or more sources for purposes of meeting the definition of open dumping. Ag. Br. at 2.

Smith claims that the materials were left on the property by a former occupant. Smith also argues that the Agency has no proof that the materials at the Alagna property were consolidated from outside the property. As a result, he claims that there can be no consolidation but cites no authority for his proposition. Sm. Br. at 6.

Smith also claims that there is no evidence in the record proving that the Alagna property is not a sanitary landfill. Sm. Br. at 6.

The Board examines the definition of open dumping. First, the Board finds that that Smith and his employees were consolidating materials from one or more sources. Even if the Board were to ignore the steel beams that Smith brought in from offsite, the Board finds that the piling of debris from various sources at the Alagna property qualifies as consolidation. The Board also finds that the Alagna property is a disposal site and that it does not fulfill the requirements of a sanitary landfill.

Waste

The Agency argues that the materials that Keigley saw at the Alagna property are discarded material within the definition of the term waste. Ag. Br. at 2.

Smith points out that at hearing Keigley testified that the burning material was not garbage. Sm. Br. at 5 citing Tr. at 24. Smith claims that the Agency had to prove that the material was discarded in order for it to qualify as waste but that the Agency failed to do so. Smith claims that Ms. Alagna leased the property to Smith for scrap recycling and that the wood and plastic in the burn piles were recyclable materials. Sm. Br. at 5.

Smith also claims that the Agency failed to prove the prior use of the material in the burn piles and that without proof of prior use a material cannot be classified as discarded. Sm. Br. at 5 citing Bliss, Inc. v. IEPA, 138 Ill. App. 3d 699, 706, 485 N.E.2d 1154, 1159 (5th Dist. 1985).

The Board can factually distinguish Bliss. Bliss involved the spraying of trichloroethylene (TCE)-contaminated oil in a railroad yard. TCE is a hazardous substance. The Board found Bliss guilty of creating a water pollution hazard. The appellate court found that there was "no effort made to establish that this particular quantity or concentration of TCE was likely to create a nuisance . . . " Bliss, 138 Ill. App. 3d at 704, 485 N.E. 2d at 1157. The appellate court went on to find that the TCE was not a waste, under these circumstances, since "the prior use or origin of a substance must be present to establish that a substance is a 'waste'". Bliss, 138 Ill. App. 3d at 706, 485 N.E. 2d at 1159. There are no allegations of spilled oil or hazardous substance contamination here as there were in Bliss.

Although some of the material at the Alagna property may be recyclable, not all of it is. If it was all recyclable, Smith would not be burning any of it. The Board finds that the scraps of wood and plastic, the sewer tiles, and the plank-looking material on the Alagna property are properly classified as discarded and therefore constitute waste.

The Board finds that Smith has caused or allowed the open dumping of waste at the Alagna property. The Board now examines whether or not open burning has occurred.

Open Burning - Section 21(p)(3)

Arguments

The Agency argues that Section 21(p)(3) of the Act does not require a respondent to cause open burning but rather to cause or allow open dumping that *results* in open burning. Ag. Br. at 4. The Agency claims that the two piles of burning material which Keigley saw and photographed at the Alagna property meet the definition of open burning. Ag. Br. at 3.

Although Smith did not direct his employees to start the fires, the Agency argues that Smith was aware that flammable materials were present and that he was aware of the possibility of fires because he told his employees to be careful not to start fires. Ag. Br. at 3.

The Agency relies on the testimony of employee Jean who said that fires are common when he cuts steel. The Agency also cites the close proximity of the cut steel and the burn pile in Photo #2 of the Agency's Exhibit. Ag. Br. at 3.

The Agency claims that, because knowledge or intent is not necessary to find a violation of the Act, accidental fires resulting from open dumping can violate Section 21(p)(3) of the Act. Ag. Br. at 4 citing County of LaSalle v. Raikes, AC 97-24 (Apr. 17, 1997).

Smith cites cases in which Board findings of accidental open burning were reversed on the grounds that intent was necessary to find a violation of the Act. Sm. Br. at 7 citing Wasteland Inc. v. PCB, 118 Ill. App. 3d 1041, 456 N.E.2d 964 (3d Dist. 1983); People v. Joliet Railway Equipment Co., 108 Ill. App.3d 197, 438 N.E.2d 1205 (3d Dist. 1982); McIntyre v. PCB, 8 Ill. App. 3d 1026, 291 N.E.2d 253 (3d Dist. 1972). However, Smith then admits that the Board found that the decision in Fiorini overruled the intent requirement for open burning in Wasteland and McIntyre. Sm. Br. at 8.

The Agency claims that the fact situation in Raikes is very similar to the one in this matter. Ag. Br. at 4. Smith attempts to factually distinguish Raikes. He states that there was more waste on the property in Raikes than at the Alagna property, no firsthand testimony as to how the fire started, no fencing around the property, no attempts to stop the fire, and other recent fires at the property. Sm. Br at 8-9.

Discussion

The Board finds that the Agency need only prove that the open dumping which occurred at the Alagna property resulted in open burning.

In Raikes the Board determined that the Supreme Court holding in Fiorini trumped the earlier appellate court findings in McIntyre and Wasteland. The Board also determined that Fiorini is the controlling precedent. *See* Raikes, AC 97-24. The Board stands by its finding from Raikes and also finds that Fiorini trumps Joliet Railway as the finding on intent in Joliet Railway is based on McIntyre. Neither knowledge nor intent is necessary to find a violation of Section 21(p)(3) of the Act. Even if the burning at the Alagna property was an accident, it would still be a violation of Section 21(p)(3).

Contrary to Smith's assertion, the Board finds that the fact situation in Raikes is very similar to the events at the Alagna property. Raikes owned a scrap metal yard where materials such as tires, vehicles, scrap metal, and some 55-gallon drums had been consolidated into a burning pile. There was also other miscellaneous scrap metal scattered around the yard. Raikes told the investigators that his grandson may have accidentally started the fire while cutting scrap metal.

In Raikes the Board found that the open dumping there occurred in a manner that resulted in open burning. The Board pointed to the condition in which the waste was scattered around the property, the fact that the fire started as a result of scrap metal cutting near

accumulations of waste, and that Raikes had been on notice that such fires could occur at his yard. *See* Raikes, AC 97-24.

In this matter, Keigley's photographs show the freshly cut steel beams in close proximity to the burn piles. Jean also admitted that he had been cutting the beams pictured. Also, Smith's warnings about starting fires and Jean's testimony about such fires being a common occurrence reveal that Smith and his employees were on notice about the possibility of fires starting. *Id.*

The Board finds that Smith's open dumping resulted in open burning.

FIELD'S INSTRUCTIONS TO SMITH'S EMPLOYEES

The Agency did not deny the testimony regarding Fields' instructions to Smith's employees to not put out the fires. The Agency points out that Fields told both of Smith's employees that open burning was a violation of the Act and regulations. The Agency also claims that the violation of Section 21(p)(3) occurred as soon as the first pile caught fire even if Smith or his employees were not aware of it. Ag. Br. at 5. The Agency states that any effort on the part of Smith or his employees to douse the fires would not have eliminated the violation of Section 21(p)(3). Ag. Br. at 5. Smith did not respond to these arguments.

Although the Board does not condone Fields instructions to Smith's employees, the Board agrees that the open burning violation occurred when the piles caught fire. The fact that Fields left the Alagna property and then brought Keigley back with him to take pictures does not excuse Smith's liability for the open burning violation.

CONCLUSION

For the reasons stated above, the Board finds that Smith has violated Section 21(p)(3) of the Act at the Alagna property. This interim opinion constitutes the Board's interim fining of fact and conclusions of law.

ORDER

1. The Board finds that respondent Alan K. Smith has violated Section 21(p)(3) of the Environmental Protection Act at the Natalie Alagna property in Urbana, Champaign County. 415 ILCS 5/21(p)(3) (2000).

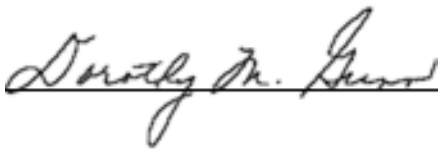
2. The Illinois Environmental Protection Agency must file a statement of its hearing costs within 14 days of the date of this order, or by June 20, 2002. The statement must be supported by affidavit and served on respondents. Within the same 14 days (by June 20, 2002), the Clerk of the Board must file a statement of the Board's hearing costs supported by affidavit and with service.

3. Smith is given leave to file a reply to the statements of hearing costs ordered in paragraph 2 of this order within 14 days after receipt of that information.

4. The Board will then issue a final order assessing a statutory penalty of $1,500 for the violation and awarding appropriate costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on June 6, 2002 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board