

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

IN THE MATTER OF:)
)
DAN HEUSINKVED, County Clerk,) AC 87-25, Docket A
County of Whiteside, State of) (IEPA Docket No. 8302-C)
Illinois,)
)
Respondent.)

MR. BILL SELTZER, STAFF ATTORNEY, APPEAR ON BEHALF OF THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

MR. CARL L. SPENCER, STATE'S ATTORNEY, APPEARED ON BEHALF OF
RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a March 25, 1987, filing of an Administrative Citation by the Illinois Environmental Protection Agency ("Agency") and an April 29, 1987, filing of a Petition for Review filed by Respondent. Both filings are pursuant to Ill. Rev. Stat. 1986 Supp., Ch. 111^{1/2}, par. 1031.1, the Illinois Environmental Protection Act ("Act").

Hearing was held on October 27, 1987, in the Whiteside County Courthouse, Morrison, Illinois. Testimony was presented by Mr. Jack Holzer, an Agency Environmental Specialist, on behalf of the Agency, and by Mr. Douglas Happ, Superintendent of Highways for Whiteside County and ex-officio Director of the Whiteside County Landfill, on behalf of Respondent. Members of the press and public were in attendance.

The Agency on December 1, 1987, filed a Brief in Lieu of Closing Argument. No Response Brief has been filed by Respondent.

BACKGROUND

Whiteside County operates a sanitary landfill under Illinois Environmental Protection Agency Operating Permit No. 1983-4-OP. On January 23, 1987, Mr. Holzer inspected the landfill site. On the basis of Mr. Holzer's inspection, the Agency determined that Respondent on the day of inspection had operated the site in violation of two provisions of the Act, to wit:

- (p) No person shall conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:

5. uncovered refuse remaining from any previous operating day, unless authorized by permit;
12. failure to collect and contain litter from the site by the end of each operating day.

Ill. Rev. Stat. 1986 Supp., ch. 111 $\frac{1}{2}$,
par. 1021(p)(5) and (p)(12).

Accordingly, the Agency on March 25, 1987, issued an Administrative Citation to Respondent in which a civil penalty of \$500 was assessed for each of the two violations, pursuant to Section 42(b)(4) of the Act.

Respondent now contests before this Board the Agency's determination of the two violations. Respondent pleads in the alternative that, if the Agency's determinations of violation is upheld, that the violations should be found to have resulted from uncontrollable circumstances, thus invoking the "uncontrollable circumstances" provision of the Act:

.... if the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.

Ill. Rev. Stat. 1986 Supp., ch. 111 $\frac{1}{2}$,
par. 1031.1(d)(2).

AGENCY'S DETERMINATION OF VIOLATION

Failure to Provide Daily Cover

In support of its determination that Respondent failed to provide required daily cover, the Agency submits photographs (Ex. 1, Photos #1-#6¹) taken by Mr. Holzer during his site inspection of January 23, 1987. These photographs show various views of the landfill's active trench as it existed on the morning of January 23 at times ranging from 7:40 A.M. to 7:55 A.M. The photographs show that refuse from prior day activities had been graded and compacted (R. at 15). However, they also show portions of this

¹ Exhibit 1 is a composite exhibit (R. at 56) including 25 photographs taken by Mr. Holzer during his January 23, 1987, inspection. The photographs are consecutively numbered and are referred to herein as Photo #1, #2, etc. The Board notes that the Agency refers to the same photographs in its Brief as Exhibit #1, Exhibit #2, etc.

refuse protruding through what appears to be a sparse and discontinuous covering of earth.

The Board's regulations require daily cover be provided to a depth of at least six inches. The photographs as discussed and the testimony of Mr. Holzer (R. at 16-22, 28, 45-48) demonstrate that this requirement had not been met for the refuse disposed on at least the immediately preceding work day. Moreover, Respondent's own witness, Mr. Happ, admitted that daily cover to a depth of six inches was not present over the entirety of refuse disposed prior to January 23, 1987 (R. at 73, 77, 79). Accordingly, the Board finds that the Agency's determination of violation on the count of failure to provide required daily cover was correct, and hereby upholds that determination of violation.

Failure to Collect and Contain Litter

In support of its determination that Respondent failed to collect and contain litter, the Agency submits additional photographs (Ex. 1, Photos #7-#25) also taken by Mr. Holzer during his site inspection of January 23, 1987. These photographs are of various views within and extending beyond the boundaries of Respondent's landfill site. The photographs were taken between 8:00 A.M. and 10:15 A.M. on the date in question, and show litter at various locations within the landfill site.

Mr. Holzer characterized the litter shown in one photograph (Ex. 1, Photo #7) as follows:

... That litter has been there for some time through all evidence and appearance. And in fact, there was some of it I had seen on previous inspections. They're matted down into the weed area but most of it had been there ... for some time. (R. at 29).

Mr. Holzer also characterized the litter shown in Exhibit 1, Photo #7 through Photo #22 in the following exchange:

Q. ...Can you testify whether or not the litter depicted in Photographs 21 and 22, was that litter from that operating day or was it litter from a previous operating day?

A. That was litter from a previous operating day.

Q. Is that true with all of the photographs we've talked about so far, that showed litter?

A. That is correct.

Q. And how do you know that that is from some previous operating day?

- A. Once again, by the condition of the litter, the faded-out appearance, the sagging appearance of it, and again, the site had not received any material to speak of and I particularly noticed at the time that dumping was going on, on the western slope in the active area side, that no litter, blown litter was coming over.
- Q. So, in other words, on the day, at the time of that inspection, the wind conditions were such that there was no litter being blown off the active area, is that correct?
- A. Very early in the morning and up until I left, there was very little wind to speak of.

R. at 36-7

Respondent does not contest that the photographs show wind-blown litter within the confines of the landfill site (R. at 52, 86). Rather, Respondent contends that the statute is intended to address only litter beyond the landfill site (Id.). As a preliminary matter, the Board finds that neither the photographs nor testimony demonstrate, nor does the Agency in fact contend, that on the date in question litter originating from Respondent's landfill site existed beyond the boundaries of the landfill site.

Rather, the issue then is whether regulations require that litter be collected and contained within a landfill site as opposed to from beyond a site. The Board notes that Section 21(p)(12) of the Act, on its face, is not particularly instructive on this issue. This Section identifies as a violation subject to Administrative Citation "failure to collect and contain litter from the site by the end of each operating day" (emphasis added). The phrase "from the site" is clearly ambiguous. It allows a reading that the requirement to collect and contain litter pertains to litter which came from within the site, but is no longer found therein. Equally, it allows a reading that the requirement pertains to litter from the surface of the site, and hence to litter which remains within the site boundaries.

It is therefore necessary to go beyond Section 21(p)(12) for guidance. That guidance is properly found in the Board's rules governing waste disposal, specifically 35 Ill. Adm. Code Subtitle G. Contained therein are regulations governing various requirements for landfill operation, of which litter control is one. Violations of this substantially larger body of regulations are prosecuted through enforcement actions brought before this Board or within the court system. The nexus between these regulations and the Administrative Citation procedure of the Act is that the Administrative Citation procedure was designed to

expedite the regular enforcement process by identifying a subset of the larger waste disposal regulations which may be prosecuted through the Administrative Citation procedure.

The litter control section of 35 Ill. Adm. Code Subtitle G removes the ambiguity found at Section 31(p)(12) of the Act. Specifically the former states:

All litter shall be collected from the sanitary landfill site by the end of each working day and either placed in the fill and compacted and covered that day, or stored in a covered container.

35 Ill. Adm. Code 807.306

Here the plain reading is that litter must be collected daily from the landfill site itself. This rule is silent on the matter of the collection of litter from beyond the landfill site.

The Board therefore finds that the interpretation placed upon Section 21(p)(12) by the Agency, which is that it is a violation of that Section of the Act to fail to daily collect and contain litter within the site boundaries, is the correct interpretation. Additionally, the Board finds, in light of the photographic evidence and testimony as presented, that Respondent was on January 23, 1987, in violation of Section 31(p)(12) of the Act. The Board therefore upholds the determination to that effect as made by the Agency.

ISSUE OF UNCONTROLLABLE CIRCUMSTANCES

Respondent next contends that such failure to apply daily cover or to collect and contain litter as may have been manifest on January 23, 1987, was due to uncontrollable circumstances. As argument thereto Respondent contends weather-related factors prior to and on the day of inspection inhibited it from fully complying with the cover and litter regulations. Among inhibiting weather-related factors, Respondent cites cold, frozen ground, wind, snow cover.

It is uncontested that the temperature on the morning of Mr. Holzer's inspection was 8 degrees below zero (R. at 22, 54). It is also uncontested that some of the ground within the landfill site, including that material used as cover, contained ground ice (R. at 55).

The Agency contends, however, that the existence of such conditions does not alone constitute grounds for holding that Respondent was unable to comply with regulations due to uncontrollable circumstances. On the matter of failure to apply daily cover, Agency points out, citing Mr. Holzer's testimony (R.

at 27), that other landfills operations are regularly capable of complying with all regulations throughout the cold weather months. This includes times when temperatures are as low as those encountered on the day of inspection (R. at 27). Mr. Holzer further testified that he observed equipment digging and moving cover material at the time of his inspection, in spite of the cold and supposed hardness of the ground (R. at 33-34, 38; Ex. 1, Photo #16.). The Agency thus concludes that failure to apply daily cover was not beyond Respondent's control, but rather that "Respondent simply failed to apply daily cover as required" (Brief at 4).

The Board finds that Respondent has not borne its burden of proof of showing that the failure to apply daily cover resulted from uncontrollable circumstances. The record sufficiently shows that daily cover could be placed in spite of conditions. Moreover, it apparently shows that some cover had been placed. What is not shown, however, is why the requisite covering job was not, or could not have been, accomplished.

On the matter of failure to daily collect and contain litter, Respondent argues that it is impossible to completely contain all of the litter which may be blown about a landfill site on a windy day. Respondent further attempts to make the point that some of the litter observed by Mr. Holzer during his inspection and recorded in Exhibit 1, Photo #7 through Photo #25, may have been recent litter rather than litter which had been uncollected for some time (R. at 52), as asserted by Mr. Holzer. Nowhere, however, does Respondent contend that the large amount of litter shown in Photos #7 through #25 all derived from refuse brought to the site on the day of inspection or the immediately preceding day(s). Neither does Respondent present any evidence that weather conditions on the previous day(s) prohibited it from the collecting litter.

The Board is aware that litter control may at times, particularly during high winds, be difficult. However, this does not mean that litter control is impossible nor that the regulations regarding litter control are impractical. It is precisely because litter control is at times difficult that it is necessary for policing of litter to be carried out on a regular basis, so as to preclude major litter dispersment when the ability to contain litter is less than optimal. Respondent has failed to show that on January 23, 1987, it had undertaken this necessary policing.

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

...

Respondent will therefore be ordered to pay a civil penalty of \$1000, 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.

Respondent is also required to pay hearing costs incurred by the Board and the Agency. The Clerk of the Board and the Agency will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Respondent. 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) Respondent is hereby found to have been in violation on January 23, 1987, of Ill. Rev. Stat. 1986 Supp., Ch. 111^{1/2}, par. 1021(p)(5) and 1021(p)(12).

2) Within 45 days of this Order of January 21, 1988, Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$1000 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, Illinois 62706

3) Docket A in this matter is hereby closed.

4) Within 30 days of this Order of January 21, 1988, the Illinois Environmental Protection Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and

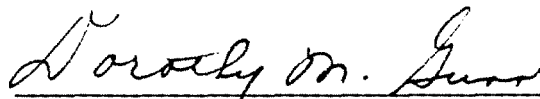
with service upon Repondent. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Respondent. Such filings shall be entered in Docket B of this matter.

5) Respondent is hereby given leave to file a reply/objection to the filings as ordered in 4) within 45 days of this Order of January 21, 1988.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 $\frac{1}{2}$ par. 1041, provides for appeal of Final Orders of the Board within 35 days of the issuance of Final Orders. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of January, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board