ILLINOIS POLLUTION CONTROL BOARD
December 21, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	PCB 71-298
	)	
CITY OF WAUKEGAN, a Municipal Corporation; ZION STATE BANK AND TRUST COMPANY, a Bank chartered by the State of Illinois; T-K CITY DISPOSAL INC., an Illinois Corporation; TEWES COMPANY, INC., an Illinois Corporation	)	

Lee Campbell, appearing on behalf of the Environmental Protection Agency

Murray Conzelman, appearing on behalf of the City of Waukegan

John Sloan, appearing on behalf of T-K Disposal Inc. and Tewes Company, Inc.

Donald Lindquist, appearing on behalf of the Zion Bank and Trust Company

OPINION OF THE BOARD (by Mr. Kissel):

On October 1, 1971, the Environmental Protection Agency (the "Agency") filed a complaint with the Board alleging that on certain dates in June of 1971 the City of Waukegan, T-K Disposal, Inc., and Tewes Company, Inc. operated a landfill site in the City of Waukegan, contrary to the Environmental Protection Act and the Rules and Regulations promulgated thereunder. Specifically, Waukegan and the Zion Bank were accused of operating the site without first obtaining the permit required by Section 21(e) of the Act, of causing or allowing open dumping as prohibited by 21(b) of the Act, Rule 3.04 of the Rules and Regulations for Refuse Disposal Sites and Facilities (the "Refuse Rules"), and Section 471 of the Refuse Disposal Sites and Facilities Act, of failing to adequately spread and compact the refuse and apply daily cover as required by Rules 5.06 and 5.07(a) of the Refuse Rules, of not providing fencing, access and sanitary facilities as required by

Rule 5.02 of the Refuse Rules, and of creating a water pollution hazard contrary to Section 12(d) of the Act by the improper depositing of contaminants on the land near water, and T-K Disposal and Tewes are accused of having deposited refuse on the site in violation of Section 21(f) of the Act. The Agency asked that Waukegan and the Zion Bank be required to apply for an operating permit for the site and properly close the site. In addition, the Agency requested that an order be entered by the Board directing all respondents to cease and desist from further violation of the Act and applicable regulations, and that money penalties be assessed against each of the respondents. In response, the City of Waukegan, Tewes and T-K Disposal filed "special and limited" appearances and moved to dismiss the complaint on various grounds which challenged the jurisdiction of the Board. A hearing was held on the complaint of November 23, 1971 before Michael Berkman, Hearing Officer.

Before discussing the events of the case, we must first turn to a consideration of the motions to dismiss filed by Waukegan and Tewes. [1] The three grounds of Waukegan's motion to dismiss will be dealt with separately:

(1) That Section 42 of the Act permits actions only be filed in the name of the People of the State of Illinois and brought only by the State's Attorney or the Attorney General, and thus, the action brought here in the name of the Environmental Protection Agency was improper. We disagree. The action brought in this case is indeed permitted by Section 31(a) of the Act which not only gives the Agency authority to file a complaint, as it did in this case, but requires it to do so when its investigation discloses that "a violation [of the Act or the Rules and Regulations] may exist", Section 103(a), Chapter 111-1/2, Ill. Rev. Stat. In addition, in this case one of Waukegan's objections is moot because the Attorney General did prosecute the case.

(2) Section 33(b) of the Act is unconstitutional insofar as it permits the Board to impose money penalties, and therefore confers judicial power upon an administrative body. We have dealt with this argument on other occasions and particularly in the case of EPA v. Modern Plating Corp.,PCB 70-38, May 3, 1971; see particularly pages 3-8. We adopt the reasoning in that case here that

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[1] For purposes of brevity and clarity, the use of the word "Tewes" will mean both Tewes and T-K Disposal, unless otherwise indicated.

Illinois has long recognized the right of the legislature to confer quasi-judicial power, including the power to impose money penalties, on administrative agencies. As the Modern Plating opinion pointed out, the granting of these powers is not novel, but "What is novel is that an argument against such authority can still be heard today", supra, page 4.

(3) The Board does not have the power to enter a cease and desist order since the complaint did not allege a continuing violation of the Act or the Rules, or the lack of an adequate remedy at law. This argument has even less merit than does the other point made by Waukegan. The Board has the power to impose cease and desist orders under Section 33(b) of the Act; and may enter such orders as it deems necessary under the Act to stop violations of the law or the regulations. In this case, there could be a continuing violation of the law if the City failed to properly cover the landfill as required or if the City failed to get the required permit, and this was alleged as a violation. Whether a cease and desist order will be entered by the Board, however, is to be determined by the facts of the case obtained after hearing, and it is not a proper issue to be raised before the hearing in a motion to dismiss. For these reasons we believe that the motion to dismiss should be denied. Tewes also filed a motion to dismiss on similar grounds and that should be denied as well. Waukegan, T-K Disposal, and Tewes are subject to the jurisdiction of this Board, and if the evidence warrants it, can have penalties and a cease and desist order entered against them by the Board.

One other procedural point. Waukegan and Tewes filed a jury demand in this case, apparently contending that they are entitled to a jury trial in any complaint seeking penalties under the Act. We have previously dealt with this matter of the right to trial by jury in EPA v. Modern Plating Corp., supra, and we adopt that opinion here. Generally, in administrative matters, the Illinois Courts have held constitutional the imposition of penalties by administrative agencies without a trial by jury. See People v. Crawford, 80 Ill. App. 2d 237, 255 NE 2d 80 (1967) and Department of Finance v. Cohen, 369 Ill.510, 17 NE 2d 327 (1938). The demand for a jury trial by Waukegan and Tewes will, therefore, be denied.

Now to the events of the case. Each year the City of Waukegan sponsors a program called the "Spring Clean Up Week". The citizens of the town are encouraged to dispose of solid refuse of varying kinds (but not garbage) and the City picks up the refuse for depositing at a disposal site. In 1971, "Spring Clean Up Week" ran from June 14 through June 18. Waukegan hired Tewes to handle the wastes collected during the week and also made arrangements with the owner of the property located northeast of the intersection of Butrick Road and Wilson Avenue and south of Blanchard Road in Waukegan

to dump the refuse on that property. This kind of arrangement was typical of other years during the "Spring Clean Up".

Before discussing the specific violations alleged by the Agency, we should first deal with the matter of the liability of the Zion Bank. The testimony showed that the Zion Bank merely held this property as a trustee in a land trust. The Bank did not receive any benefits of ownership of the property, and merely held the title from the beneficiaries of the trust. This kind of ownership, without involvement in the management of the property itself, is not enough to impose liability in the Zion Bank. There was no proof that the bank made substantial decisions about the use of the property. We,therefore, relieve the Zion Bank of any responsibility for the use of the site. By this decision we are not saying that the trustees of land trusts will be automatically released from responsibility, but we are saying that no proof existed that this trustee, the Zion Bank, participated in, or had anything to do with, decisions concerning the use of the property.

The first allegation made by the Agency is that Waukegan and the Zion Bank failed to get a permit as required by Section 21(e) of the Act. Since we have relieved the Zion Bank from any responsibility, we will only consider whether Waukegan should have gotten a permit. Section 21(e) of the Act provides that:

> "No person shall:
> (e) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, . . .

The Agency proved that Waukegan did not apply for, or receive, a permit from the Agency as required by the above quoted Section of the Act. Waukegan either knew, or should have known, that a permit was necessary before it could operate a refuse disposal site. The Section is clear in stating the obligation of the City to get a permit. Since it didn't, it violated the Act. It is clear that the exception pertaining to refuse "generated by the operator's activities" does not apply to the facts of the case. The refuse deposited at the site in this case was generated by the residents of Waukegan and not by the activities of the City in performing its daily affairs. Simply put, Waukegan violated Section 21(e) of the

Act in failing to apply for and receive a permit before operating the refuse disposal site described herein.

Violations of many of the Refuse Rules were also proved. The uncontradicted testimony was that there was no fencing of the site (96, 161) as required by Rule 4.03(a) of the Refuse Rules, and there were no sanitary facilities (98, 161, 213) and shelter (97, 161, 213) as required by Rule 4.03(c) of the Refuse Rules. Obviously, Waukegan regarded this as a "temporary" refuse facility, but even so, it must have complied with the Act and the Refuse Rules as stated. It didn't.

In addition to the violations detailed above, Waukegan was also accused of open dumping of refuse, failure to compact the refuse, failure to confine the dumped refuse to the "smallest practicable area, and failure to adequately cover the refuse after it was dumped. Each of the violations were proved on certain dates between June 14 and June 18, 1971. Open dumping by Waukegan trucks was demonstrated by the uncontradicted testimony of three witnesses on each of the days in question. The witnesses testified to actually seeing the trucks, marked with the name of the City of Waukegan, dumping refuse on the site, and coupled with the evidence outlined below concerning the failure to cover the refuse, the proof of open dumping couldn't be clearer. It is certainly true that to prove "open dumping" as described in the Refuse Regulations, one must show that not only was there dumping in the open on an unapproved site, but that the material was not properly covered as required by the Refuse Rules.

One witness testified that the equipment (bulldozer) on the site was doing nothing more than packing the refuse around to make a clearer way for the incoming dumping trucks. Another said that the area of dumping was too large and was therefore uncontrollable. It is difficult from the testimony to say that Waukegan used these "bad practices" every day, but we can say that from the evidence the site was not being operated as it should have been.

The witnesses attempted to say that Waukegan did not provide adequate cover on the refuse as required by Rule 5.07(a) which requires a daily cover of at least six inches of material on the refuse. But as the attorney for Waukegan pointed out, none of the witnesses were at the site at the end of the day to definitely prove that adequate cover was not used. The testimony of the witnesses generally is that they observed the same refuse from one day to the next which to them demonstrated that adequate cover had not been properly applied. We agree, but we can only find violations on June 18 and 19 when the same refuse was actually found by the witnesses on the next day. It would be eminently more convincing if more photos had been taken of the actual refuse site to prove that cover had not been applied.

We now turn to the question of liability of Tewes and T-K Disposal. Tewes and T-K Disposal are only alleged to be guilty of open dumping in violation of Section 21(f) of the Act. Neither company had the responsibility of doing anything with the site itself. They merely contracted to bring the refuse to the site and deposit it. From the testimony, they did their job well. They were seen dumping refuse on June 15 (Tewes and T-K Disposal), June 16 (Tewes), and June 17 (Tewes and T-K Disposal). No permit was required of Tewes or T-K Disposal to dump refuse on the site, and therefore the question is whether they should be held responsible for depositing refuse on a site apparently authorized for dumping by the City of Waukegan. We think they should be held to the responsibility of inquiring as to whether a permit has been issued for the site and therefore whether it is a proper place for the disposal of refuse. To hold otherwise would allow collusion between cities and dumpers, allowing those who do the dumping to walk away with ignorance and say "I didn't know I couldn't dump there." Open dumping is a serious environmental problem like open burning. Both are the grossest of violations and those who are involved in conducting them must be held to accept the consequences. To require that Tewes or T-K Disposal inquire about the site in advance is not an unreasonable burden. Apparently, both companies are in the business of hauling refuse and have done so many times in the past. These are not people unfamiliar with the laws of open dumping, so to allow them to go free in this case would give carte blanche to all haulers of refuse in the state to dump anywhere they wish and say "I didn't know." Furthermore, the Agency telephoned T-K Disposal on June 15, 1971, and advised them that continued use of the site would violate Section 21(f) of the Act. This telephone call was confirmed by a letter sent to Mr. Tewes of T-K Disposal on June 16, 1971. See complainant's Exhibit 8. In fact, then, Tewes knew that further use of the site could subject him to an action before the Board. He took the risk and lost.

This opinion constitutes the findings of fact and conclusions of law of the Board.

O R D E R

Based upon the evidence and exhibits in the record, the Board hereby orders the following:

1. Waukegan shall pay a money penalty to the State of Illinois in the amount of $1,000 for its failure to obtain a permit, failure to provide fencing around the site, failure to post a proper sign, failure to provide shelter, failure to compact refuse, open dumping, failure to confine the refuse to the smallest practicable area, and failure to adequately cover the refuse after it was dumped, all in violation of the Act and the Regulations as described in the

2. Waukegan shall not operate the refuse disposal site described in this opinion without first applying for a permit as required in the Act.

3. Tewes and T-K Disposal shall each pay a money penalty to the State of Illinois of $250 for the dumping of refuse as described in the opinion.

Mr. Dumelle will submit a Supplemental Statement.

I, Christan Moffett, Acting Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 21st day of December, 1971 by a vote of 4-0.

Christan L. Moffett