

COPY

ILLINOIS POLLUTION CONTROL BOARD

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OCT 26 2004

STATE OF ILLINOIS
Pollution Control Board

TERESA L. SHEPRO, as Trustee of the)
Justice W. Shepro Trust,)
and TERESA L. SHEPRO and)
FRANK WIEMERSLAGE, as)
beneficiaries under Trust No. 898, of the)
Chicago Trust Company,)
Complainant,)

Case No. PCB 04-12

v.)

NEWBY OIL COMPANY, DAVID E.)
TRIPP and JANICE L. TRIPP,)
Respondents.)

**RESPONDENT, NEWBY OIL'S OBJECTIONS TO
MOTION TO COMPEL DISCOVERY**

NOW COMES NEWBY OIL COMPANY, by its attorney, William C. Murphy, and for its objections to Complainant's Motion to Permit Soil Sample Testing on Newby's property states as follows:

SUMMARY

1. The motion is beyond the discovery allowed by PCB Rules. Case Law, even under Supreme Court Rule 214, has disallowed similar drilling requests.
2. Respondent Newby has cooperated with the EPA with Respondent's permission the EPA did excavate on Respondent's property. No contaminants were found above Tier 'levels'. The Motion is thus burdensome and duplicative.
3. Complainants seek a fishing expedition on Respondent's property which the Hearing Officer should deny. After extensive discovery, no spill has been proved. All 55 gallon drums stored on Respondent's property were empty except one. As to that one deposited without

Respondent's knowledgem, by an unknown person minimal spillage occurred.

4. Finally, Complainants seek this Motion only to attempt to avoid responsibility for polluting their own site themselves.

The Motion accordingly should be denied.

1. County of Kane v. Elmhurst National Bank 111 Ill. App. 3d.292, 443 NE2d. 1149, 67 Ill. Dec. 25 (2nd District, 1982) is decisive. In this case, the defendants owned land and they appealed an order that would have allowed the Plaintiff County to enter their land and conduct subsoil tests such as soil boring. Although this case dealt with the County and an issue of eminent domain, the Appellate Court stated, "authorizing soil borings and a geological study without the landowners' consent or a prior condemnation proceeding would be invalid even if statutorily authorized. Such drilling and excavation, even where subsequent backfilling has been required, has been properly recognized as a substantial interference with the landowners' property rights rather than a minimally intrusive preliminary survey causing only incidental damage." *County of Kane* at 299. (emphasis added)

The Illinois Administrative Code (Section 35 of 101.614 relied upon by complainants only allows an Officer to order the "production of relevant matters". What is requested here is a right to permit "soil sample testing", through "borings" (Motion Paragraph 11) There is no mention of allowing invasion of a landowner's property in the Administrative Code. Such is not a production of relevant matters. It would be an unconstitutional harassment and interference with the orderly conduct or respondent's business. The motion should be denied.

2. Respondents have already allowed the EPA to excavate on their property. A copy of that inspection report and photographs of it are attached as Exhibits 1 and 2. No contaminants above

Tierl were found. Mr. Kazmerski or the EPA said in his deposition that only compounds found in any urban area were found and that EPA site scoring would not be enough to warrant a Federal or State cleanup. Complainants are not entitled to a second bite of the apple.

3. What is really at issue here is complainants' inability to prove their case after extensive discovery. Except for the obvious fact that Newby stores empty 55 gallon oil drums on its property and that minimal petroleum contamination has been discovered on complainants' property, the only evidence is conjectural. To the contrary, no pollutants were discovered in the top 4 or 5 feet of the site alleged to be polluted.

4. Discovery has demonstrated that Complainants probably caused any site pollution themselves.³

a. Testing Service Corp, engaged by Frank R. Weimerslage, reported on March 24, 1994 (p 00002 of Complainants' Discovery Production ("CDP" hereafter)).

* * *

The Site consists of a relatively flat, sparsely vegetated parcel which gently slopes to the north. A swale running south to north bisects the central part of the parcel. The Site is bounded on the north by Oakland Place, on the south by farmland and on the west and east by light industrial buildings. Approximately one block further west of the Site lies Illinois State Route 23.

Surficial observations indicate black clayey topsoil covers the Site. Several large piles of miscellaneous debris were noted in the center of the Site. Noted among the debris were an abandoned semi-trailer, scrap metal, carpet, automobile parts, tires, glass, yard waste, wood, concrete, bricks, wire, furniture, corrugated steel, plumbing materials consisting of toilets and piping, barbed wire, several empty quarts of motor oil and six empty 55 gallon drums. In addition to this miscellaneous debris, a partially full 5 gallon can labelled brake fluid was noted. No staining or areas of stressed Site vegetation were observed in these areas or other portions of the Site. No indications of underground storage tanks were visible at the ground surface.

* * *

TSC recommended that "proper disposal of the debris be arranged" (CDP 000003).

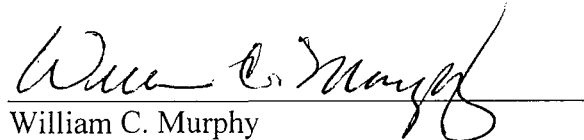
Instead Wiemerslage hired Bob Kyler Excavating for \$11,225 to dig a hole and bury the junk on site (CDP 000004).

The EPA report of what happened is attached as Exhibit 3.

The photos taken by the EPA of the hole are attached as Exhibits 4 and 5.

For all the above reasons, the Motion to Compel should be DENIED.

Respectfully submitted this 21st day of OCTOBER, 2004.


William C. Murphy

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Narrative

On April 23, 2003 I (Greg Kazmerski) held a Compliance Sampling Inspection at Newby Oil Company located in Sycamore, Illinois. Newby Oil is alleged to be the source of soil and groundwater contamination [REDACTED]. Due to the [REDACTED] inconclusiveness of the initial complaint investigation, a surface soil sample was obtained from Newby Oil Company.

On December 12, 2002, I investigated the initial complaint against Newby Oil. This complaint alleged that Newby Oil Company had contaminated the [REDACTED] with Benzene and Tetrachloroethane (see attached analytical results from [REDACTED]). Based upon the information provided by the complainant (a detailed site investigation including soil borings and groundwater data) and information contained in the agency file which documented open dumping a burial of waste on the [REDACTED], I was unable to draw any conclusions as to the source of the contamination. As a result, I agreed to sample the soil from Newby Oil.

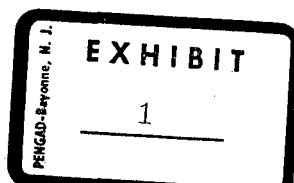
The sample I obtained (X101) was located approximately [REDACTED] of the location where the contamination [REDACTED] the [REDACTED] was discovered (see site drawing). The complainant suggested this location. The sample was obtained by digging through the gravel until native soil was reached. The sample was then taken using the "Encore" sampling device from approximately six inches below the native soil surface. Three Encore tubes were obtained. The sample was sealed with evidence tape on site and cooled. The sample was delivered to the IEPA Organic Laboratory in Springfield, Illinois where it was be analyzed for Volatile Organic Chemicals.

The sample results were received on May 22, 2003. The sample results indicated that levels of Benzene and Tetrachloroethane were below detection limits. No compounds were detected above Tier 1 Objectives.

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037000000-DeKalb County

Neby Oil Company

FOS File

IEPA BUREAU OF LAND DIGITAL PHOTOGRAPH PHOTOCOPIES

Date: 23-Apr-03
Time: 12:42
Direction: West
Photo By: Kazmerski
File Name: 037000000-042303-001
Comments: Sample X101



Date: 23-Apr-03
Time: 12:42
Direction: West
Photo By: Kazmerski
File Name: 037000000-042303-002
Comments: Location of sample
X101 relative to GP-
1/GP-12/MW-4



037000000-042303.snp



200018

0370000000--DeKalb County
Wiemerslage

Complaint Investigation

On June 28, 1994, the Rockford Regional Office received a complaint that a vacant lot in the City of Sycamore was being excavated, and a semi-trailer full of solid waste was buried in the excavation. The complainant stated that the hole was still open on the day of the complaint and that the trailer was visible in the hole. The vacant lot was located on Oakland Drive, immediately to the west of Newby Oil.

I arrived at the site at 12:05 p.m. on June 28. A man, who identified himself as Bob Kyler, owner of Kyler Excavating was sitting on a backhoe, eating lunch. I advised him of the complaint and then looked in the hole. The hole measured approximately 30' by 30' by 12' deep. Mr. Kyler admitted that he had buried a semi trailer that was present on the lot for many years. The owner of the lot wanted to get rid of the semi trailer, and Mr. Kyler came in with the lowest bid. He stated that he called the City of Sycamore's Code Enforcement office. They stated that they did not have any rules against burial of solid waste, so Mr. Kyler proceeded with the excavation. When I looked into the hole, I found landscape waste, building materials (lumber, metal, wires, and a few tires). The actual semi trailer was not visible. Mr. Kyler stated that it was crushed under the weight of the other items and dirt.

I advised Mr. Kyler that he could not put anything other than clean fill into the hole, and then I explained the definition of "clean fill" to him. I told him that everything would have to go to the landfill, compost facility, or to a recycling facility. I also told him that I would like to see the hole when it was empty, before it was backfilled, and I would like to have dump receipts. He was very cordial and cooperative, and stated that he would have to contact the owner of the property. He gave me the phone number for his office, and told me to call his wife (the dispatcher), and to get the name and address of the owner from her.

When I returned to the office, I phoned Mr. Kyler's wife. She advised me that the owner of the property was Frank Wiemerslage, 711 S. Seminary, Park Ridge, Illinois, 60068. She also stated that she had phoned Mr. Wiemerslage to tell him about my site visit.

I then phoned the owner, and told him about the problem. He stated that the disposal would add much more money to the cost of the job, but he eventually would have to do it. Then, I phoned Mrs. Kyler back. She stated that the hole would be empty, and everything would be hauled away by the following Friday, July 8. I told her that I would meet her husband at the lot on the morning of July 8.

On July 8, I arrived at the facility at 8:45 a.m. Mr. Kyler was present. The hole was completely empty, and he handed me several receipts from the Dekalb County Landfill (site #0378020001), and Dekalb Iron and Metal (site #0370105011). There was pile of clean concrete chunks present near the hole, and another pile (approximately 2 dump truck loads) of old lumber near the hole. He stated that he would put the concrete into the hole and the lumber would go to the landfill and he would mail me the remaining receipts. I told him that that would be fine (copies of the receipts are attached).

Photographs #2 and 3 face southwest, showing the refuse in the excavated hole. Photographs #11 and 12 face southwest, showing the empty hole (the water is from several downpours, including one approximately 1/2 hour before I was present on the 8th. There was no evidence that the water was groundwater).

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EXHIBIT

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