ILLINOIS POLLUTION CONTROL BOARD
April 6, 2006

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 05-8
	)	(IEPA No. 330-04-AC)
TED HARRISON and GERALD S. GILL,	)	(Administrative Citation)
Respondents.	)	

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

On July 19, 2004, the Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against Mr. Ted Harrison and Mr. Gerald S. Gill (respondents). *See* 415 ILCS 5/31.1(c) (2004); 35 Ill. Adm. Code 108.202(c). The Agency alleges that respondents violated Section 21(p)(1) and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) and (p)(7) (2004)). The Agency further alleges that Mr. Harrison and Mr. Gill violated these provisions by causing or allowing the open dumping of waste in a manner that resulted in litter and the deposition of general or clean construction or demolition debris at a soil treatment facility located east of Garner Road in the southeast quarter of Section 35, T. 18 N, R 10 W, in Sangamon Valley Township, Cass County. The site is known as Virginia/Ted Harrison Oil, and designated with Site Code No. 0170255004. Virginia/Ted Harrison Oil was owned formerly by Mr. Harrison and is owned currently by Mr. Gill. The Board accepted Mr. Harrison and Mr. Gill's petitions for hearing on September 2, 2004.

On February 10, 2006, Mr. Harrison moved the Board for summary judgment in his favor on the two alleged violations. The Agency responded on February 27, 2006. For the reasons set forth below, the Board denies Mr. Harrison's motion for summary judgment and directs the hearing officer to proceed expeditiously to hearing on both alleged violations with both respondents.

UNCONTESTED FACTS

Mr. Gill purchased property from Mr. Ted Harrison on July 20, 2002, and acquired possession on July 31, 2002. Between July 2002 and August 2004, Mr. Gill removed scrap metals, an air conditioning unit, 1,470 tires, three truckloads of general refuse, and 44,450 pounds of tire pieces from the site. Mr. Gill admits that as of August 20, 2004, a mobile home and several empty steel drums remained on the site.

Agency inspectors, Mr. David Jansen and Mr. William Zierath, inspected the site on May 23, 2004. The May 23, 2004 inspection report indicated that much of the waste originally observed on the site during a May 20, 2002 inspection, including general refuse, lumber, scrap

metal, vehicles, used tires, concrete, bricks, and chemical wastes in containers, still remained at the site. Upon arrival at Mr. Gill's property, the Agency inspectors observed a pile of waste 20 cubic yards in volume containing wood, metal, wallboard, 3 rolls of wood fencing, clay tile, a window frame and concrete blocks. Insp. Rep. at 4. Mr. Jansen's report further describes numerous trucks, truck trailers, and cars on the property, old household appliances, and about 60 to 80 cubic yards of used tires or parts of used tires scattered around one area of the site. Some of the used tires at the site contained standing water. In addition, there was a pile of lumber and drywall, a pile of carpeting, and general refuse discarded down the slope of a ravine near the entrance.

Mr. Harrison was seen at the site removing materials from Mr. Gill's shed during an Agency inspection on November 6, 2003. Agency Resp., Exh. A, par. 4. Agency inspectors observed Mr. Harrison on Mr. Gill's property again during a December 3, 2003 inspection. Mr. Harrison told the inspectors that he was working on cleaning up the waste and removing materials he had left on the property now owned by Mr. Gill. Agency Resp., Exh. A, par. 5. In the contract for the sale of the property, Mr. Harrison admitted that he kept "rubber tires and junk" on the site. Mot. Exh. 1, par. 9.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*; citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986).

THE PARTIES ARGUMENTS

Mr. Harrison

In his motion, Mr. Harrison states that he did not cause or allow the deposition of waste materials on Mr. Gill's property in a manner resulting in open dumping as alleged in the administrative citation. Further, Mr. Harrison contends that the inspector did not directly observe Mr. Harrison do anything on the date of inspection. Based on these two arguments, Mr. Harrison argues that no genuine issue of material fact exists, and Mr. Harrison is entitled to summary judgment in his favor on both of the alleged violations. Mot. at 1.

Mr. Harrison claims that a provision contained in the contract for the sale of property prevents Mr. Gill from having any further claims against Mr. Harrison for the removal of junk and tires on the property. Mr. Harrison states that after the sale of the property, Mr. Gill became solely responsible for the items left on the property. Mot. at 3. The contract also provided, according to Mr. Harrison, a $20,000 escrow fund to Mr. Gill for the disposal of the junk and tires on the property. Mr. Harrison states that to date, Mr. Gill has not used the $20,000. *Id.*

Further, Mr. Harrison contends that contrary to the requirements of Section 31.1 of the Act, the Agency inspector did not "directly observe" Mr. Harrison violate any statute during the May 26, 2004 inspection. Mot. at 3. For these reasons, Mr. Harrison urges the Board to grant summary judgment in his favor.

The Agency

The Agency argues that several issues of material fact remain and summary judgment is not appropriate at this time. First, the Agency states that whether Mr. Harrison caused or allowed the deposition of waste materials is at issue. Resp. at 1.

The Agency disputes the argument that because Mr. Harrison did not own the property on the date of the May 23, 2004 inspection, he could not have caused or allowed the alleged deposition of waste on the property. The Agency states that pursuant to the Act and Board precedent it need not demonstrate ownership of a site in order to prove a violation of 415 ILCS 5/21(p)(2004). Resp. at 2; citing IEPA v. Coleman, AC 04-18, slip op. at 6 (June 17, 2004).

The Agency also disagrees with the argument that the contract for the sale of the property resolves Mr. Harrison's liability to the State. Resp. at 3. The Agency states it was not a party to the contract between the respondents and cannot be bound by it. *Id*. Further, the Agency states the parties cannot contract away the State's right to enforce the Act. *Id*.

Next, the Agency challenges Mr. Harrison's contention that he is not responsible for the violations because he had no "right to do anything" on the site after September 30, 2002. According to the Agency, it is a reasonable inference that Mr. Gill would have allowed Mr. Harrison on the site to remove some of the waste he, Mr. Harrison, left on the site. Resp. at 3. The Agency asserts this conclusion is supported by the fact that Agency inspectors observed Mr. Harrison on the site cleaning up waste during the November 6, 2003 and December 2, 2003 inspections. The Agency contends that Mr. Harrison continued to exercise control over and manage the wastes he left on the site for more than a year after selling the property to Mr. Gill. Resp. at 4.

Finally, the Agency contends that whether the inspector caught Mr. Harrison in the act of committing the alleged violation is not relevant. Resp. at 4. The Agency states that the Act requires only that the Agency "on the basis of direct observation, determine that any person has violated any provision of subjection (o) or (p)" prior to issuing an administrative citation. *Id*. The Agency contends there is no legal requirement that the respondent be "caught in the act" of committing the offense, and that the Board has often found violations of Section 21(p) without such evidence. Resp. at 4; citing Coleman, AC 04-18; IEPA v. Bencie, AC 04-777 (Feb. 16, 2006); IEPA v. Groff, AC 05-20 (Oct. 20, 2005); IEPA v. Brown, AC 04-82 (July 7, 2005). For these reasons, the Agency urges the Board to deny Mr. Harrison's motion for summary judgment.

BOARD DISCUSSION

As discussed above, summary judgment is appropriate only when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The Board finds that in this case summary judgment is not appropriate.

The only statutory defense to an administrative citation is that the violations were the result of uncontrollable circumstances. *See* IEPA v. John Groff, AC 05-20 (Oct. 20, 2005), although the respondent can attempt to prove that the violations did not occur. *See* IEPA v. Omer Thomas, AC 89-215
(Jan. 23, 1992). Here, Mr. Harrison does not deny that refuse, debris and other wastes were found on the property, but rather claims that he did not cause or allow the open dumping and that the Agency inspectors did not directly observe him do anything on the date of the inspection.

Mr. Harrison relies on the contract for the sale of the property to support his argument that he "had no further right to do anything on the property subsequent to September 30, 2002." Open dumping, however, occurs under the Act *when refuse is consolidated* at a disposal site that does not fulfill sanitary landfill requirements. IEPA v. PCB, 219 Ill. App. 3d 975, 579 N.E.2d 1215 (5th Dist. 1991) (emphasis added); *see also* 415 ILCS 5/3.305 (2004). Therefore, whether Mr. Harrison could enter the property after its sale is not relevant to the determination of whether he caused or allowed the open dumping.

The Board agrees that the respondent need not own a site to cause a violation under Section 21(p) of the Act. *See* 415 ICLS 5/21(p) (2004). Rather, the Act prohibits "any person" from causing or allowing the open dumping of waste. *Id*. To find a violation, the Agency "must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." County of Vermilion v. Village of Tilton, AC 04-22 slip op. at 11 (Dec. 16, 2004); citing People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 620. Here, Mr. Harrison said he could not remove debris from Mr. Gill's property because his presence on the property would constitute criminal trespass. However, Agency inspectors observed Mr. Harrison on the property two times since he sold the property to Mr. Gill. Therefore, whether Mr. Harrison exercised control over the site when the alleged pollution occurred remains at issue.

The Board also finds that Mr. Harrison's "direct observation" argument is without merit. The Board finds, as the Agency argues, that Section 31.1 of the Act does not require the Agency to directly observe the respondent causing or allowing the open dumping to have a claim under Section 21(p) of the Act. Rather, pursuant to the alleged violations, the Act requires the Agency inspector to have made a direct observation of refuse consolidated at a disposal site in a manner that constitutes the open dumping of litter, and general or clean construction or demolition debris. 415 ILCS 5/21(p)(1), (7) (2004). The Board finds here that the Agency inspector had an unobstructed view of the trucks, tires, and other debris, as reflected by the photos contained in the record. In addition, Mr. Harrison does not dispute the accuracy of the photos or inspection report describing what was found on the property. Accordingly, the Board finds that Mr. Harrison's alleged "failure to personally observe" argument fails. *See* County of Jackson v. Egon Kamarasy, PCB 04-63, 64 slip op. at 22 (June 6, 2005).

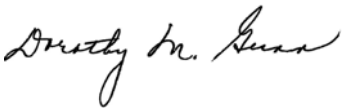
Also, facts are in dispute as to when some of the alleged open dumping occurred. In his petition for review, Mr. Harrison states that no waste materials have been deposited at the site by any person since July 31, 2002. Pet. at 2. However, Agency Inspector Dan Jansen's December 15, 2003 inspection report states that "[s]ome tires had been added to the pile of junk previously shown in photo #005 taken on November 6, 2003." Mr. Jansen's June 23, 2004 inspection report indicated that "2 truck trailers, a corn planter, and a blue Ford Pickup had been added to the area south of the gate, but north of the treatment area." Accordingly, the Board finds that summary judgment is not appropriate at this time.

CONCLUSION

The Board denies Mr. Harrison's motion for summary judgment and directs the hearing officer to proceed expeditiously to hearing on both alleged violations with both respondents.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 6, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board