

ILLINOIS POLLUTION CONTROL BOARD
August 17, 2006

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 06-33
) (Enforcement - Land)
J&S COMPANIES, INC., a Missouri)
corporation, and FIRST CHOICE)
CONSTRUCTION, INC., an Illinois)
corporation,)
)
Respondents.)

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

On June 29, 2006, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), moved the Board for remedies and civil penalties against J&S Companies, Inc. (J&S). On June 15, 2006, the Board granted the People's motion for summary judgment as to J&S on violations of Sections 21(a), (d)(1), (e), and (1) and (7) of the Environmental Protection Act (Act) as alleged in the People's two-count complaint (415 ILCS 5/21(a), (d)(1), (e), (p)(1) and (7) (2004)).

Also on June 15, 2006, the Board directed the People and J&S to discuss whether to impose a remedy, if any, including a civil penalty, and propose a civil penalty, if any, including a specific dollar amount in briefs or at hearing. The People addressed these factors in the June 29, 2006 motion, while J&S has not responded. In today's opinion and order, the Board considers all the facts and circumstances bearing upon the reasonableness of J&S's violations, and any matters of record that may mitigate or aggravate the imposition of a civil penalty, and imposes a \$25,000 civil penalty. The Board closes the docket as to J&S only.

PROCEDURAL BACKGROUND

On September 1, 2005, the People filed a two-count complaint (Compl.) against J&S and First Choice Construction, Inc. (First Choice). *See* 415 ILCS 5/31(c)(1) (2004). The People allege that the respondents violated Sections 21(a), (d)(1) and (2), (e), and (p)(1) and (7) of the Act (415 ILCS 5/21(a), (d)(1) and (2), (e), (p)(1) and (7) (2004)). The People further alleged that the respondents violated these provisions by improperly disposing of construction or demolition debris from a demolition site, conducting a waste disposal site without a permit, and causing or allowing the open dumping of waste in a manner resulting in litter and the deposition of general or clean construction or demolition debris.

On September 15, 2005, the Board accepted the complaint for hearing. *See* 35 Ill. Adm. Code 103.212(c). The Board noted that the respondents must answer the complaint within 60

days after receiving the complaint, and directed the hearing officer to proceed to hearing. The People filed a request for admission of fact directed towards First Choice, on April 25, 2006, and a motion for summary judgment against J&S on the violations on April 24, 2006 (Mot. for SJ). Neither respondent filed an answer to the complaint.

On May 24, 2006, First Choice filed an answer to request for admission of fact, accompanied by a “general objection and motion to strike” the requests to admit. On June 15, 2006, the Board granted the People’s motion for summary judgment as to J&S.

Because the People did not move for summary judgment with respect to First Choice, nor analyze the Section 33(c) or 42(h) factors of the Act (415 ILCS 5/33(c), 42(h) (2004)) in requesting a civil penalty, the Board ordered the parties to address those issues in briefs or at hearing.

The People filed a motion for remedies and civil penalties as to J&S only on June 29, 2006. To date, J&S has not responded to this motion, let alone made an appearance in this proceeding. If a party files no response to a motion within 14 days, the party is deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d).

FACTS

On December 30, 2003, Illinois Environmental Protection Agency (Agency) inspector Chris Cahnovsky inspected a site located at 7401 Bunkum Road in East St. Louis, St. Clair County. Mr. Jim McKnight owns the facility, called Classic Manufacturing, Inc. (Classic Manufacturing). Mr. Cahnovsky observed approximately 90 piles of construction and demolition debris, consisting of brick, metal, plaster, paper, wood, pipe chase, wire and rebar. Mot. for SJ, Exh. B.

The East St. Louis Board of Education, District 189 contracted J&S to demolish the Lansdowne Jr. High School in a contract dated February 6, 2003. First Choice was hired to bring waste from the Lansdowne demolition site to the Classic Manufacturing site. A letter from the owner of the Classic Manufacturing site shows J&S was aware that material from the Lansdowne High School was being delivered to the site. Mot. for SJ, Exh. B at 4.

STATUTORY BACKGROUND

Section 21(a) of the Act prohibits the open dumping of waste. 415 ILCS 5/21(a) (2004). Sections 21(d)(1) and (2) prohibit waste storage, waste treatment, or waste disposal without a permit granted by the Agency, or in violation of the Board regulations and standards, respectively. 415 ILCS 5/21(d)(1), (2) (2004). Section 21(e) of the Act prohibits disposing, treating, or storing any waste, or transporting waste for disposal at a site or facility that does not meet the requirements of the Act and Board standards and regulations. 415 ILCS 5/21(e) (2004). Sections 21(p)(1) and (7) prohibit the open dumping of any waste in a manner that results in litter or the deposition of general or clean construction or demolition debris. 415 ILCS 5/21(p)(1), (7) (2004).

After the Board finds a violation, the Board considers all facts and circumstances of record including, but not limited to, the factors set forth in Section 33(c) of the Act to devise an appropriate remedy for the violation. *See* 415 ILCS 5/33(c) (2004). Section 33(c) of the Act provides in part:

In making its orders and determinations, the Board shall take into consideration:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2004).

The maximum civil penalties the Board may assess are established by Section 42(a) of the Act, which provides in part:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (2004).

In determining the appropriate civil penalty, the Board may consider any mitigating and aggravating factors of record including those set forth in Section 42(h) of the Act:

- 1. the duration and gravity of the violation;
- 2. the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of the Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- 3. any economic benefits accrued by the violator because of delay in compliance with requirements;
- 4. the amount of monetary penalty which will serve to deter further violations by the violator and other persons similarly subject to the Act; and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
7. whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. P.A. 93-575, *eff.* Jan. 1, 2004 (*to be codified as* 415 ILCS 5/42(h) (2004)).

SUMMARY OF FINDINGS OF VIOLATION

In its June 15, 2006 order, the Board granted summary judgment against J&S. As to count I, the Board found that J&S violated Sections 21(a), (d)(1), (e), and (p)(1) and (7) of the Act. 415 ILCS 5/21(a), (d)(1), (e), (p)(1) and (7) (2004). J&S caused these violations by improperly disposing of construction and demolition debris from a demolition site, conducting a waste disposal site without a permit, and causing or allowing the open dumping of waste in a manner resulting in litter and the deposition of general or clean construction or demolition debris.

J&S violated these provisions when, during 2003, J&S demolished the Lansdowne Junior High School in East St. Louis, St. Clair County. Compl. at 3. J&S hired First Choice to haul the construction or demolition debris from the school demolition site. *Id.* First Choice hauled approximately 92 truckloads of construction or demolition debris from the school demolition site to 7401 Bunkum Road in East St. Louis. The property where the debris was taken was not permitted by the Agency as a sanitary landfill. For these reasons, the Board found that J&S violated Section 21(a) of the Act by causing or allowing the open dumping of waste.

The Board found that J&S conducted a waste storage or waste disposal operation without an Agency-issued permit beginning on February 6, 2003, in violation of Section 21(d)(1) of the Act. Compl. at 4. Also under count I, the Board found that in 2003, J&S disposed of or stored waste at a site that did not meet the requirements of the Act or Board regulations in violation of Section 21(e) of the Act. *Id.* By causing or allowing the open dumping of waste during that same time period in a manner that resulted in litter, J&S violated Section 21(p)(1) of the Act.

As to count II, the Board found that during 2003, J&S caused or allowed the open dumping of general construction or demolition debris at the site in violation of Section 21(p)(7) of the Act. 415 ILCS 5/21(p)(7) (2004).

MOTION FOR REMEDIES

The People move for civil penalties OF \$25,000 against J&S for violations of the Act. The People also ask the Board to order J&S to cease and desist from further violations of the Act.

33(c) Factors

In granting summary judgment to the People, the Board has found that J&S has committed the alleged violations. When a complainant proves an alleged violation, the Board must consider the factors in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2004). The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

The People's Arguments

The People state that J&S' demolition business has social and economic value and that the demolition business is suitable for the area in which J&S operates. The People contend that J&S has subsequently complied with the Act and Board regulations. The People state, however, that J&S threatened human health and the environment by causing or allowing open dumping and improper disposal of construction or demolition debris. Further, argue the People, properly disposing of construction or demolition debris is both technically feasible and economically reasonable.

Board Discussion of 33(c) Factors

The People reached conclusions regarding the 33(c) factors without applying any relevant facts supporting those conclusions. Despite the lack of analysis by the complainant, the Board finds that, based on the record, the factors weigh in favor of assessing a civil penalty.

The People state that J&S' demolition business has social and economic value and that the demolition business is suitable for the area in which it operates. The record lacks information about the number of people J&S employs or other information about the business. The Board nonetheless finds that as a demolition business, J&S has social and economic value, but in this case that value was undercut by J&S' knowledge that First Choice improperly disposed of material from the demolition site. The 7491 Bunkum Road site was an unsuitable location for disposal because it was not permitted.

Photographs from the Agency inspection depict numerous piles of construction or demolition debris on the site consisting of brick, metal, paper, wood, wire, and rebar. Mot. for SJ, Exh. B. In addition to being an eyesore, openly dumped material like that found at the Classic Manufacturing site poses threats to groundwater and can lead to the proliferation of disease vectors. The character and degree of injury to the People of East St. Louis was not slight, even though environmental consequences or health effects are not quantified in this record.

The record contains no evidence concerning the technical practicability and economic reasonableness of reducing or eliminating the open dumping of waste resulting in litter and the deposition of general or clean construction or demolition debris. Without evidence to the contrary, the Board finds compliance was economically reasonable and technically feasible. In fact, as the People state, that J&S has subsequently complied with the Act.

After considering the Section 33(c) factors, the Board orders J&S to cease and desist from further violations and also finds that a civil penalty is warranted in this instance. To determine the proper penalty, the Board considers factors listed in Section 42(h) of the Act. 415 ILCS 4/42(h) (2004).

42(h) Factors

Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

People's Arguments

In considering the duration and gravity of the violations, the People state that J&S violated the Act, as found, for a period of eight months, over which time J&S avoided the cost of cleaning the site or getting proper permits from the Agency.

The People state, however, that J&S was diligent in complying with the Act by removing waste from the site. The People suggest that \$25,000 will deter further violations of the Act by this respondent and others similarly subject to the Act. Finally, the People state J&S has no previously adjudicated violations of the Act.

Board Discussion of 42(h) Factors

J&S has violated five different sections of the Act. Section 42(a) provides that the Board may impose a civil penalty of up to \$50,000 for the violation of any provision of the Act or Board regulations, and \$10,000 for each day the violation continues. 415 ILCS 5/42(a) (2004). The record shows that the violations in this matter lasted for at least eight months, over which time J&S enjoyed disposing of the waste at no cost rather than properly disposing of the waste in a landfill. J&S did not actually perform the open dumping, but was aware of the violations while they occurred. The People do not allege any actual harm to the environment, but the Board finds the violations found were serious and could have led to harm to human health and the environment. The record contains no indication that J&S self-disclosed the non-compliance. Rather, the record shows that an Agency inspector found the violations. These factors weigh in aggravation of a civil penalty.

The People do not state how responsive J&S was or how long it took J&S to come into compliance, but the Board finds that J&S' site clean-up weighs in mitigation of a civil penalty. Further, the record does not indicate that J&S has any previously adjudicated violations.

By its complete lack of participation in this proceeding, J&S did not offer any evidence to contradict the facts and legal arguments presented by the People, and accordingly waives any objection to the Board granting the People's motion for civil penalties. *See* 35 Ill. Adm. Code 101.500(d). Under these circumstances, the Board grants the motion and imposes the \$25,000 civil penalty proposed by the People. *See People v. J&F Hauling, Inc.*, PCB 02-21 (Feb. 6, 2003) (imposing the People's requested civil penalty where respondent failed to participate).

CONCLUSION

The Board imposes a \$25,000 civil penalty on J&S. In addition, the Board orders J&S to cease and desist from further violating the Act.

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

ORDER

1. The Board incorporates by reference its June 15, 2006 order granting the Office of the Attorney General, on behalf of the People of the State of Illinois (People), summary judgment on both counts of the complaint as alleged against J&S Company, Inc. (J&S). That order finds J&S in violation of Sections 21(a), (d)(1), (e) and (p)(1) and (7) of the Environmental Protection Act (Act). 415 ILCS 5/21(a), (d)(1), (e), (p)(1) and (7) (2004).
2. J&S must pay a civil penalty of \$25,000 no later than September 18, 2006, which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or the electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and J&S' social security number or federal employer identification number must be included on the certified check or money order.
3. J&S must send the certified check, money order, or confirmation of electronic funds transfer by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (Act) (415 ILCS 5/42(g) (2004)) at the

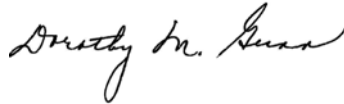
rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2004)).

5. J&S must cease and desist from further violations of the Act.

IT IS SO ORDERED.

Board Member T.E. Johnson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 17, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board