

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 22 2007

STATE OF ILLINOIS
Pollution Control Board

CITY OF CHICAGO DEPARTMENT)
OF ENVIRONMENT,)

Complainant,)

v.)

JOSE R. GONZALEZ,)

Respondent.)

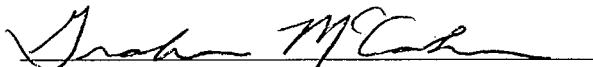
AC 06-040
(Administrative Citation)

NOTICE OF FILING

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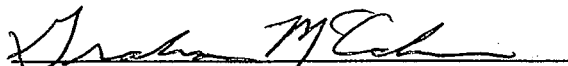
PLEASE TAKE NOTICE that on June 22, 2007, Complainant filed with the Clerk of the Illinois Pollution Control Board the attached Post-Hearing Brief, a copy of which is served upon you.


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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 22, 2007, he caused copies of this notice and the documents referenced therein to be served on the party to whom it is directed by U.S. Mail, first class postage prepaid.


Graham G. McCahan

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JOSE R. GONZALEZ,)
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Respondent.)

AC 06-40
(Administrative Citation)

CITY OF CHICAGO'S POST-HEARING BRIEF

INTRODUCTION

The City of Chicago Department of Environment (“CDOE,” “Complainant,” or “Compl.”) alleges that Jose R. Gonzalez (“Respondent”) caused or allowed open dumping of waste resulting in litter, scavenging, open burning, deposition of waste in standing water, and the deposition of general construction or demolition debris in violation of Sections 21(p)(1), 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7)(i) of the Illinois Environmental Protection Act (the “Act”). 415 ILCS 5/21(p)(1), (2), (3), (4), and (7)(i). CDOE inspectors observed these violations at 1601 E. 130th Street, Chicago, Illinois (“Site”) during an inspection on March 22, 2006. Compl. Ex. A at 6-22. Although Respondent claimed ownership of the Site during the hearing, at the time of the CDOE inspection, the Site was owned by 1601-1759 East 130th Street, LLC, an Illinois limited liability company. Compl. Ex. B; Beddard¹ Tr. at 101, 134-36.

¹ The hearing for AC 06-40 took place over two days and utilized three separate court reporters. Because each court reporter started her transcript at page 1, the transcripts have overlapping page numbers. This brief will refer to each transcript by the last name of the court reporter in order to avoid confusion. The name of the court reporter (Manzo, O'Donnell, or Beddard) appears on the first and last page of the transcript for each session.

ARGUMENT

A. Respondent Caused or Allowed Open Dumping of Waste in Violation of Section 21(a)

1. Open Dumping Occurred at the Site

In order to demonstrate that Respondent violated any of the subsections to Section 21(p) of the Act, it must first be shown that Respondent violated Section 21(a) of the Act. 415 ILCS 5/21(p). *See IEPA v. Shrum*, AC 05-18 (IPCB Mar. 16, 2006). CDOE demonstrated at hearing that Respondent caused or allowed open dumping at the Site in violation of Section 21(a) of the Act. 415 ILCS 5/21(a). “Open dumping” is defined as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.” 415 ILCS 5/3.305. “Refuse” is “waste,” (415 ILCS 5/3.385) and “waste” is defined to include “any garbage . . . or other discarded material” (415 ILCS 5/3.535).

The CDOE inspection report admitted into evidence as Complainant’s Exhibit A and the testimony at hearing show that broken concrete, scrap metal, compost materials, landscaping debris, railroad ties, street signs, wood, construction debris, used tires, and ash and remains from burning were accumulated in various piles on the Site on March 22, 2006. Compl. Ex. A at 6, and 9-22; Manzo Tr. at 12-13; O’Donnell Tr. at 4-5; Beddard Tr. at 10, 111-12. Respondent admitted that some time after March 22, 2006, at least some of the waste that is the subject of this action was disposed of at three separate landfills: Tri-State Disposal, Lincoln [Disposal], and the CID Landfill. Beddard Tr. at 127-32. The fact that the materials were taken to landfills demonstrates that the materials lacked productive or re-use value and, therefore, constitute “discarded material” within the meaning of the term “waste” and, by extension, “refuse” under Section 21(a) of the

Act. 415 ILCS 5/21(a). *See IEPA v. Carrico*, AC 04-27 (IPCB Sep. 2, 2004); *IEPA v. Cadwallader*, AC 03-13 (IPCB May 20, 2004).

The waste observed on the Site on March 22, 2006 came from one or more off-site sources as required under Section 21(a) of the Act. 415 ILCS 5/21(a). Respondent admitted that the waste observed on March 22, 2006 fell into three broad categories: 1) waste that was on the Site when 1601-1759 East 130th Street, LLC purchased the Site; 2) waste that was brought onto the Site by “fly-dumpers” after 1601-1759 East 130th Street, LLC acquired the Site; and, 3) waste that was brought onto the property by E. King [Construction] as part of an agreement with the Respondent. *Beddard Tr.* at 106-09, 111-14. Since the waste observed on the Site on March 22, 2006 was brought onto the Site from external locations, it was “consolidated” on the Site from “one or more sources” pursuant to Section 21(a) of the Act. 415 ILCS 5/21(a).

The Site does not meet the requirements of a sanitary landfill and is not permitted as such. Respondent admitted that the Illinois Environmental Protection Agency (“IEPA”) has not issued a permit for any operations on the Site. *Beddard Tr.* at 134. Therefore, the Site conditions observed on March 22, 2006 fulfill all of the requirements of “open dumping” as defined under Section 3.305 of the Act. 415 ILCS 5/3.305.

2. Respondent Caused or Allowed Open Dumping on the Site

Respondent caused or allowed the open dumping observed on March 22, 2006 because he controlled access to and operations on the Site. The Board has held that ownership of property is not a prerequisite to violating Section 21(p) of the Act, but a complainant must show that the alleged open dumper had control over the source or site of pollution. *See IEPA v. Cadwallader*, AC 03-13 (IPCB May 20, 2004); *IEPA v.*

Pekarsky, AC 01-37 (IPCB Feb. 7, 2002). Although the last recorded transfer of the Site shows that 1601-1759 East 130th Street, LLC is the owner of record (Compl. Ex. B), the Respondent at hearing showed significant personal knowledge of the Site and personal involvement with activities at the Site. For example, Respondent repeatedly referred to the Site as his property and described in detail his preparations and future plans for the Site, as demonstrated in the following exchange between Mr. Levine (Respondent's counsel) and Respondent:

- Q. And are you the owner of the property at 1601 East 130th Street?
A. Yes.
Q. Did you acquire the property in the winter of late 2005/early 2006?
A. Yes.
Q. Do you know the specific date you acquired it?
A. I don't remember off the top of my head.
Q. Okay. When you acquired the property – what do you plan to do with the property?
A. The property when I was – I'm having – It's in a design state right now. The blueprints for the property are probably, like, 80 percent done. I'm going to develop the property. I'm going to put commercial precast buildings on it, and I'm going to set up my company there. We're to going to put six buildings, about 36,000 square feet each building, and we're going to lease out the space to tenants for the Ford Company.
Beddard Tr. at 101-02; see also Beddard Tr. at 103-07, 112, 115, and 134-37.

Respondent also demonstrated substantial personal knowledge and involvement with the post-March 22, 2006 removal of waste from the Site. Beddard Tr. at 127-32. For example, Respondent knew the particular landfill destination for each type of waste material and arranged to use a friend's account to dump materials at one of the landfills. Beddard Tr. at 127-32. Respondent acknowledged that during the spring of 2006 he had workers on the Site spreading gravel in order to facilitate clean up and development of the Site. Beddard Tr. at 105-06. On the day of the CDOE inspection, Respondent was

present at the Site and attempted to exercise control over the Site by asking the CDOE inspector to leave the property. O'Donnell Tr. at 25; Compl. Ex. A at 6. Respondent's overall knowledge of and involvement with the Site demonstrate that he had sufficient control over the movement of trucks, people and materials onto and off of the Site to be liable for "causing and allowing open dumping" under Illinois law.

In addition, dumping could only occur at the Site if the Respondent either failed to secure the driveway or allowed trucks to enter. The only vehicle entrance to the Site was a gravel driveway secured by a gate with a lock on it. Manzo Tr. at 9; O'Donnell Tr. at 86 and 124; Beddard Tr. at 8 and 17. Vehicles were unable to access the Site at other points because the Site was otherwise surrounded by a fence, a large berm, and train tracks. Compl. Ex. A. at 8, 14, 18, and 20. Respondent admitted that if the front gate was secured, the berm was sufficient to keep trucks off of the Site. Beddard Tr. at 108. Respondent also admitted, however, that he provided a key to E. King and that E. King dumped between 1,000 to 1,500 cubic yards of waste on the Site. Beddard Tr. at 114 and 134.

Respondent claimed that fly-dumpers and E. King dumped materials at the Site without his permission. Beddard Tr. at 107 and 112-14. However, a person can cause or allow open dumping in violation of the Act without knowledge or intent. *See County of Will v. Utilities Unlimited, Inc.*, AC 97-41 (IPCB July 24, 1997), *citing*, *People v. Fiorini*, 143 Ill.2d 318, 574 N.E.2d 612 (1991). In *County of Jackson v. Donald Taylor*, AC 89-258 (IPCB Jan. 10, 1991), Mr. Taylor admitted to an ownership interest in land and to dumping some materials there, but denied the majority of the dumping as well as starting the fire. *Id.* In finding violations of Section 21(q) (now Section 21(p)), the Board found

that the fact that Mr. Taylor did not specifically allow the dumping or burning was not dispositive and that “the debris he placed on the property, may in fact have encouraged others to dump there.” *Id.* The facts in Respondent’s case are analogous to Mr. Taylor’s case, and the Board should similarly find Respondent liable for open dumping.

Respondent claimed that some of the waste on the Site was present when he purchased the property. *Beddard Tr.* at 102. A certified copy of the last recorded deed shows that 1601-1759 East 130th Street, LLC purchased the property in January 2005 – approximately 15 months prior to the inspection on March 22, 2006. *Compl. Ex. B; Beddard Tr.* at 134-35. The Board has held that an owner who allows waste to remain on its property after acquiring the property is liable for open dumping. *See IEPA v. Cadwallader*, AC 03-13 (IPCB May 20, 2004). Because Respondent allowed waste to remain on the Site for approximately 15 months, he should be found liable for causing or allowing open dumping.

Respondent further stated that he was trying to clean up the Site and sorting the waste in order to dispose of it at nearby landfills. *Beddard Tr.* at 127-32. The Board has repeatedly held that clean up efforts are not a defense. *See City of Chicago v. City Wide Disposal, Inc.*, AC 03-11 (IPCB Sept. 4, 2003); *County of Jackson v. Easton*, AC 96-58 (IPCB Dec. 19, 1996). As stated above, a person can cause or allow a violation of the Act without knowledge or intent. Accordingly, none of these arguments by Respondent provides a defense to the proven allegations. Respondent is therefore personally liable for causing and allowing the open dumping of waste as observed at the Site on March 22, 2006 in violation of Section 21(a) of the Act. 415 ILCS 5/21(a).

B. Respondent's Open Dumping Resulted in Litter in Violation of Section 21(p)(1)

Respondent's causing or allowing open dumping of wastes resulted in "litter" under Section 21(p)(1) of the Act. 415 ILCS 5/21(p)(1). The Act does not define "litter" but it is defined in the Litter Control Act as:

"Litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, . . . metal, . . . motor vehicle parts, . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a).

The Board has previously applied this definition of "litter" to open dumping allegations. *See St. Clair County v. Louis I. Mund*, AC 90-64 (IPCB Aug. 22, 1991). Using this definition, the scrap metal, compost materials, landscaping debris, railroad ties, street signs, treated wood, and used tires found at the Site are discarded materials and constitute "litter" under Section 21(p)(1) of the Act. Manzo Tr. at 12-13; O'Donnell Tr. at 4-5; Beddard Tr. at 10, 111-12; Compl. Ex. A. at 6-7, 9-12, and 14-16. Accordingly, the Board should find Respondent violated Section 21(p)(1).

C. Respondent's Open Dumping Resulted in Scavenging in Violation of Section 21(p)(2)

Respondent's open dumping of these wastes also resulted in scavenging in violation of Section 21(p)(2) of the Act. 415 ILCS 5/21(p)(2). "Scavenging" is not defined in the Act, but under the Illinois Administrative Code, "scavenging" is defined as "the removal of materials from a solid waste management facility or unit which is not salvaging." 35 Ill. Adm. Code 810.103. "Salvaging" is in turn defined as:

[T]he return of waste materials to use, under the supervision of the landfill operator, so long as the activity is confined to an area remote from the operating face of the landfill, it does not interfere with or otherwise delay

the operations of the landfill, and it results in the removal of all materials for salvaging from the landfill site daily or separates them by type and stores them in a manner that does not create a nuisance, harbor vectors or cause an unsightly appearance. 35 Ill. Adm. Code 810.103.

The Board has used these administrative definitions of “scavenging” and “salvaging” in determining a respondent’s liability under Section 21(p)(2) of the Act. *See County of Jackson v. Easton*, AC 96-58 (IPCB Dec. 19, 1996).

The CDOE inspection report admitted into evidence as Complainant’s Exhibit A and the testimony at hearing show that people were sorting and segregating materials on the Site for the purpose of returning some of the materials to productive use. Compl. Ex. A at 6; O’Donnell Tr. at 14-15; Beddard Tr. at 11-12, 117-18. Respondent admitted that metal was being taken out of the waste materials on the Site in order to be recycled. Beddard Tr. at 118. Because the Site was not permitted as a landfill, the return of any waste materials on the Site to productive use could not conform to the definition of “salvaging” contained in the Illinois Administrative Code. This definition of “salvaging” requires that “salvaging” activities take place at a “landfill” and under the supervision of a “landfill operator.” 35 Ill. Adm. Code 810.103. As discussed above, the Site constituted an unpermitted “open dump,” not a permitted “landfill.” Therefore, any removal of materials from the Site for the purpose of returning them to productive use must constitute “scavenging” and not “salvaging.” In addition, the materials that were to be returned to productive use were stored on the Site in such a manner as to cause an “unsightly appearance.” Compl. Ex. A at 9 and 11-17. The segregation of metal materials at the Site and their improper storage constituted “open dumping of waste in a manner that results in . . . scavenging” under Section 21(p)(2) of the Act, and therefore, Respondent violated that section.

D. Respondent's Open Dumping Resulted in Open Burning in Violation of Section 21(p)(3)

Respondent's open dumping of these wastes also resulted in open burning in violation of Section 21(p)(3) of the Act. 415 ILCS 5/21(p)(3). "Open burning" is defined in Section 3.300 of the Act, as "the combustion of any matter in the open or in an open dump." 415 ILCS 5/3.300. The CDOE inspection report admitted into evidence as Complainant's Exhibit A and the testimony at hearing show that materials were being burned in the open at the Site on March 22, 2006. Compl. Ex. A at 6 and 18-19; Manzo Tr. at 8; O'Donnell Tr. at 15-16. The first CDOE inspector to arrive at the Site that day observed open flames and smoke. Compl. Ex. A at 6 and 18-19; O'Donnell Tr. at 15-16. A CDOE inspector who arrived later observed ashes at the Site. Beddard Tr. at 11-12. As discussed above, the Site constituted an open dump. The burning of waste at the Site constituted "open dumping of waste in a manner that results in . . . open burning" under Section 21(p)(3) of the Act, and therefore, Respondent violated that section.

E. Respondent's Open Dumping Resulted in Waste Standing in Water in Violation of Section 21(p)(4)

Respondent's open dumping of these wastes also resulted in deposition of waste in standing water in violation of Section 21(p)(4) of the Act. 415 ILCS 5/21(p)(4). The CDOE inspection report admitted into evidence as Complainant's Exhibit A and the testimony at hearing show that large piles of waste were standing in two to three inches of water on the Site. Compl. Ex. A at 15 and 18-19; O'Donnell Tr. at 6, 102; Beddard Tr. at 60. As discussed above, the Site constituted an open dump. The waste found sitting in water at the Site constituted "open dumping of waste in a manner that results in . . .

waste standing in water” under Section 21(p)(4) of the Act, and therefore, Respondent violated that section.

F. Respondent’s Open Dumping Resulted in Deposition of General Construction or Demolition Debris in Violation of Section 21(p)(7)

Respondent’s open dumping of these wastes also resulted in deposition of general construction or demolition debris in violation of Section 21(p)(7) of the Act. 415 ILCS 5/21(p)(7). “General construction or demolition debris” is defined in Section 3.160 of the Act as:

[N]on-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials. 415 ILCS 5/3.160.

The CDOE inspection report admitted into evidence as Complainant’s Exhibit A and the testimony at hearing show that materials from construction, remodeling, repair or demolition activities - such as bricks, broken concrete, wiring, PVC piping, soil, wood and commingled scrap metal - were present at the Site on March 22, 2006. Compl. Ex. A at 6, 12-17, and 21-22; Manzo Tr. at 12-13; Beddard Tr. at 10. Respondent admitted that construction and demolition debris observed on the Site on March 22, 2006 had been dumped by E. King. Beddard Tr. at 112-14. These materials constituted “open dumping of waste in a manner that results in . . . deposition of general construction or demolition debris” under Section 21(p)(7)(i) of the Act, and therefore, Respondent violated that section of the Act.

CONCLUSION

The CDOE inspection report, photographs, and testimony show that Respondent caused or allowed open dumping of waste resulting in litter, scavenging, open burning, deposition of waste in standing water, and the deposition of construction or demolition debris in violation of Sections 21(p)(1), 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7) of the Illinois Environmental Protection Act. 415 ILCS 5/21(p)(1), (2), (3), (4), and (7). CDOE respectfully requests that the Board enter a final order finding that Respondent violated these sections and imposing the statutory penalty of \$7500 (\$1500 for each violation).

Respectfully submitted,

CITY OF CHICAGO
DEPARTMENT OF ENVIRONMENT

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By: 

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Dated: June 22, 2007

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