BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Complainant,	)	
v.	)	AC 2012-051
	)	(IEPA No. 87-12-AC)
NORTHERN ILLINOIS SERVICE COMPANY,	)	(Administrative Citation)
Respondent.	)	

NOTICE

John T. Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Peter DeBruyne
Peter DeBruyne, P.C.
838 North Main Street
Rockford, IL 61103

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

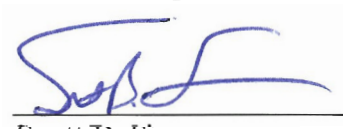
PLEASE TAKE NOTICE that I have today caused to be filed COMPLAINANT'S REPLY BRIEF with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Complainant,

Dated: November 5, 2014

BY: 

Scott B. Sievers
Special Assistant Attorney General

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

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COMPLAINANT'S REPLY BRIEF

NOW COMES the Complainant, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its counsel, Special Assistant Attorney General Scott B. Sievers, and for its reply to Respondent Northern Illinois Service Company's Brief in Response to Complainant's Post-Hearing Brief (hereafter "Response Brief") states the following:

I. NORTHERN'S ARGUMENT THAT IT CANNOT BE HELD LIABLE FOR OPEN DUMPING BECAUSE NO DISPOSAL OF DISCARDED MATERIAL OCCURRED IS UNSUPPORTED BY LAW AND FACT.

In its Response Brief, Respondent Northern Illinois Service Company ("Northern") argues that it cannot be held liable under Sections 21(p)(1) and (7) of the Act because there was no disposal of waste. (Resp. Br. at 13-16.)

Northern first contends that there was no "disposal" under the regulations. (Resp. Br. at 13-15.) Section 3.185 of the Act defines "disposal" as meaning

> the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

415 ILCS 5/3.185 (West 2014). This Board's regulations further define "disposal" as meaning

> the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land or water or into any well such that solid waste or any constituent of the solid waste may enter the environment by being emitted into the air or discharged into any waters, including groundwater. If the solid waste is accumulated and not confined or contained to prevent its entry into the environment, or there is no certain plan for its disposal elsewhere, such accumulation will constitute disposal.

35 Ill. Adm. Code 810.103 (West 2014).

In its response, Northern questions Inspector Shehane's testimony regarding whether the waste she observed deposited on Northern's site and depicted in IEPA Exhibit E or any constituent thereof could enter the environment, be emitted into the air, or discharged into any waters. (*See* Resp. Br. at 11.) However, in response to Northern's own questioning, Shehane testified of the potential for the soil, treated or painted wood, or fabric, dirt on pallets, and tarps to leach contamination into the ground, and of volatile organic compounds, or VOCs, being emitted from the soil into the air. (Tr. at 61:19-64:8.) Further, this Board in *County of Jackson v. Kamarasy* rejected the argument that an element to be proved in a Section 21(p) violation was the likelihood that waste would enter the environment, be emitted into the air, or be discharged into waters. *See* PCB Nos. AC 04-63 and AC 04-64 at 10-11 (June 16, 2005).

Northern also argues there was no disposal because any waste that was accumulated was confined to prevent its entry into the environment and that a certain plan existed for its disposal elsewhere. (*See* Resp. Br. at 13-15.) The evidence at hearing was that the waste materials piled up and depicted in IEPA Exhibit E was not contained in a dumpster, in a garbage can, or otherwise and was deposited and placed on the ground, with nothing separating the materials from the ground. (Tr. at 24:15-25:2, 42:6-43:1.) There was no evidence that the waste pile in IEPA Exhibit E was actually confined in, say, a building or other structure. Northern, instead, argues that the waste materials were "'confined'" by the way they were piled and by the solidity

of the material so deposited." (Resp. Br. at 14.) By this argument, most if not all piles of solid waste would be excluded from "disposal." While piling up solid waste serves to consolidate it into one location, it does not necessarily serve to confine that waste to prevent its entry into the environment.

Northern's citation to *County of Madison v. Abert* is misleading. In its Response Brief, Northern quotes *Abert* to suggest that the respondent's intention to dispose of waste properly by taking it to a landfill precludes it from having been disposed. (Resp. Br. at 11.) However, in *Abert*, the Board spoke of such an intention when considering whether the respondent should be held liable for improperly disposing of waste through burning when evidence existed that an independent contractor and not the respondent caused the burning to occur. PCB No. AC 91-55 at 3 (Dec. 17, 1992). The Board did not suggest that intention by itself would allow the respondent to evade meeting the definition of disposal. In fact, the Board has rejected the notion that a respondent's intention for materials is determinative in a Section 21(p) open dumping case. *See County of Sangamon v. Daily*, PCB AC 01-16 and 01-17 (Jan. 10, 2002).

In the case at bar, Northern might have intended to take the waste materials in IEPA Exhibit E to a landfill, as it had taken other waste in the past, but there was "no certain plan for its disposal" per 35 Ill. Adm. Code 810.103. In fact, the best Northern could say was that its summary in Exhibit 5 "likely demonstrates the materials … had accumulated over less than 30 days." (Resp. Br. at 15.) Northern contends that, if landfills were closed, materials such as those in IEPA Exhibit E could be stocked in the yard until enough was available to justify a load to be removed to a landfill. (Resp. Br. at 7-8.) Northern's site was not a permitted waste transfer station, (*See* Tr. at 47:20-48:3, 415 ILCS 5/3.500), and no evidence exists that it possessed the authority to serve as a temporary waste storage site to allow Northern simply to pile up waste

until it was more convenient to take it to a landfill. *See* 415 ILCS 5/3.485 (storage site definition); *see also Lake County Forest Preserve Dist. v. Ostro et al.*, PCB No. 92-80 at 6 (March 31, 1994).

In support of its contention that it did not open dump "waste," Northern notes that Inspector Shehane did not observe garbage, sludge from a waste treatment or water supply treatment plant or air pollution control facility. (Resp. Br. at 8, 15.) The definition of "waste," however, not only includes those items but also "other discarded material, including solid, liquid, semi-solid, or contained gaseous material." *See* 415 ILCS 5/3.535. Illinois EPA's Section 21(p)(1) and (7) allegations in this action contend that Northern open dumped discarded material; Northern's emphasis on other portions of the definition of "waste" are merely efforts at misdirection.

In its response, Northern acknowledges that "the materials depicted in complainant's Exhibit E were **used** supplies and equipment of Northern." (Resp. Br. at 16 (emphasis added); *see also* Resp. Br. at 17 (the IEPA Exhibit E materials are the "supplies and equipment, albeit **used**, of Northern." (emphasis added).) Northern noted that the materials such as those depicted in IEPA Exhibit E were taken to a landfill, and that those depicted in IEPA Exhibit E were, in fact, taken to a landfill. (Resp. Br. at 7, 13.) Northern makes no argument that it reused the materials depicted in IEPA Exhibit E. As Northern admits those materials were used and were subsequently taken to a landfill and makes no argument they were reused in the interim, Northern strains credulity to suggest the materials were not discarded and did not constitute waste.

As the testimony of its own employees have provided more than enough basis to establish the elements of the Section 21(p)(1) and (7) violations, Northern turns to disparaging Inspector

Shehane and questioning Illinois EPA procedures.

Northern attempts to suggest that Inspector Shehane only obtained knowledge concerning inspecting for construction and demolition debris after her March 14, 2012 inspection. (Resp. Br. at 2, 9.) Shehane, though, testified that she had clean construction and demolition debris, or CCDD, training at the time of her inspection. (Tr. at 58:4-13.) Shehane further testified that, prior to her inspection, she had more than a decade worth of experience inspecting for, documenting, and citing open dumping related violations, including open dumping causing litter or open dumping causing construction or demolition debris deposits. (Tr. at 83:20-84:17.)

Northern argues that Inspector Shehane previously had given it a warning and that, in citing it for violations of the Act, she failed to follow protocol. (Resp. Br. at 3, 10.) At hearing, however, Shehane testified that she did not give Northern a warning for the violations she observed during her March 14, 2012 inspection because "the warning had already been issued." (Tr. at 71:8-14.) Northern apparently believes that it should be allowed to violate the Environmental Protection Act, receive a warning of its violation, remedy the violation, and then repeat in perpetuity without ever facing an administrative citation or other enforcement action. Just as speeding motorists cannot count on only ever receiving nothing more than a warning if they slow down after being pulled over by police, Northern cannot count on only receiving a warning after remedying past violations if it continues to violate the Act. Significantly, this Board has held that "[t]he provisions of the [Environmental Protection] Act do not require that a warning be given prior to issuing an administrative citation." *Sangamon County Dep't of Public Health v. Hsueh* at 5 (PCB No. AC 92-79) (Opinion and Order of July 1, 1993).

II. NORTHERN'S 'REUSED TIRES' DEFENSE DOES NOT APPLY TO A SECTION 55(k)(1) COUNT, AND TESTIMONY FROM BOTH IEPA AND NORTHERN WITNESSES SHOWED NORTHERN CAUSED OR ALLOWED WATER TO ACCUMULATE IN USED OR WASTE TIRES.

In its Response Brief, Northern contends the tires that are the subject of the Section 55(k)(1) violation alleged in the Administrative Citation constituted "reused" tires and that, somehow, this contention defeats the Complainant's case. Without citation to support its argument, Northern claims that "[a] person regularly employing "reused" tires as equipment in its business has not caused or allowed water to accumulate in used or waste tires." (Resp. Br. at 2; *see also* Resp. Br. at 18.) Northern appears to confuse the Section 55(k)(1) violation for causing or allowing water to accumulate in used or waste tires with a violation for open dumping.

In support of its arguments, Northern points to *Illinois EPA v. Bennett et al.*, PCB No. AC 94-5 (Opinion and Order of April 20, 1005). In *Bennett*, the complainant alleged the respondents open-dumped used tires so as to cause or allow litter. The Board noted the majority of the tires were located inside sheds, and most of the outside tires "were clearly used in landscaping, or had been processed for use in landscaping as items such as planters and tree rings." As such, the Board held that they did not constitute open-dumped litter. The *Bennett* case provides no support for Northern's tire arguments, however, as "[t]he sole issue before the Board is whether [the alleged] open dumping resulting in litter existed at the Bennett property on December 8, 1993." No Section 55(k)(1) violation such as the one in the instant case for causing or allowing water to accumulate in used or waste tires was at issue in *Bennett.*

No question exists that a used tire that is used again, in whole or in part, by being employed in a particular application or function may constitute a "reused tire" under Section 54.08 of the Act, and that, as such, it likely would not constitute "waste" or a "waste tire" under

the Act. *See* 415 ILCS 5/4, 54.08 & 54.16. Illinois EPA recognized this concerning the tires chained to a wrecking ball for shock absorption in IEPA Exhibit D: Inspector Shehane did not observe water in them, so they were not alleged as a basis for the Section 55(k)(1) violation, and, as they were being reused, they were not a basis for the Section 21(p) violations, either. (Tr. at 34:8-35:22; 136:7-19.) Had Illinois EPA observed used tires being reused for bases for lamps, power stands, or for any other reuse and water accumulation was not caused or allowed to occur in them, then those tires would not have been cited as evidence of a Section 55(k)(1) violation.[1] Regardless whether a used tire is being reused or not, however, causing or allowing water to accumulate in it constitutes a Section 55(k)(1) violation.

Northern repeatedly argues in its Response Brief that IEPA Exhibits B and C do not show any water in tires. (Resp. Br. at 4, 12.) While IEPA Exhibits B and C could have been of a higher quality in retrospect, the cumulative testimony from witnesses in this action shows there was water in used or waste tires on Northern's site on March 14, 2012. Inspector Shehane testified she took a photograph of water in two of the four large tires stacked in the corner of the Northern site. (Tr. at 23:20-22.) Shehane testified that IEPA Exhibits B and C were blowups of two photographs attached to IEPA Exhibit A, her inspection report, and that Exhibits B and C were photographs of the tires she observed containing water. (Tr. at 33:9-34:4, 35:1-7.) Shehane testified the tires were off-rim, dirty, worn, with worn treads, uncovered, and contained water. (Tr. at 36:2-37:2; *see also* 23:6-17.) Northern's Hoff testified that there were off-rim tires in Northern's yard on the date of Shehane's inspection, and Hoff recognized the tires in IEPA

[1] Notably, Inspector Shehane did not observe anything indicating Northern planned on filling the tires with concrete, Northern's Hoff acknowledged there was nothing immediately around the tires indicating they would be filled with concrete, and Munson said nothing about such use to Inspector Shehane when she spoke to him about the tires containing water. (Tr. at 37:4-38:4; 38:5-14, 18-22; 173:11-21.)

Exhibits B and C as being present. (Tr. at 122:17-23, 133:19-23.) After Shehane spoke to him about water in some tires, Northern's Munson took a look at the tires in the yard, and Munson testified the tires did, in fact, have water in them. (Tr. at 26:15-27:5, 104:10-105:2.) This evidence and that cited further in Complainant's Post-Hearing Brief shows that Illinois EPA proved the Section 55(k)(1) violation by a preponderance of the evidence.

Finally, Northern argues that Illinois EPA "did not prove how long the tires had been on the ground so even if there were proof of water in the relevant tires, complainant's Exhibit B and C, complainant has not proved its historical fourteen day rule." (Resp. Br. at 18-19.)

Subsection 848.202(b)(5) of the Board regulations provides as follows:

> 5) Used or waste tires received at the site shall not be stored unless within 14 days after the receipt of any used tire the used tire is altered, reprocessed, converted, covered or otherwise prevented from accumulating water. All used and waste tires received at the site before June 1, 1989, shall be altered, reprocessed, converted, covered or otherwise prevented from accumulating water by January 1, 1992.

35 Ill. Adm. Code 848.202(b)(5). This provision was last amended February 14, 1992. (16 Ill. Reg. 3114.) The tire provision which Northern is alleged to have violated, Section 55(k)(1), was approved in Public Act 96-737 and effective August 25, 2009—several years after the 14-day rule to which Northern references. Statutes generally control over regulations, and Northern cites no case law or other authority that this 14-day rule provides some sort of defense, affirmative or otherwise, to a Section 55(k)(1) violation. As such, Northern's assertion of this 14-day provision is nothing but a redherring.

III. CONCLUSION

WHEREFORE, the Complainant, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board find that a preponderance of the evidence proves the Respondent violated Sections 21(p)(1), 21(p)(7), and 55(k)(1) of the Act on March 14, 2012.

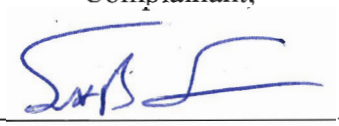
Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Complainant,

Dated: November 5, 2014

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BY: 

Scott B. Sievers
Special Assistant Attorney General

Illinois Environmental Protection Agency v. Northern Illinois Service Company
Pollution Control Board No. AC 2012-051

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **COMPLAINANT'S REPLY BRIEF** upon:

John Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Peter DeBruyne
Peter DeBruyne, P.C.
838 North Main Street
Rockford, IL 61103

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on November 5, 2014.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Complainant,

Dated: November 5, 2014

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BY: _____
Scott B. Sievers
Special Assistant Attorney General