ILLINOIS POLLUTION CONTROL BOARD
December 17, 1987

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| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Complainant, | ) | |
| v. | ) | AC 87-6 |
| JAMES PRESSNALL, | ) | |
| Respondent. | ) | |

WILLIAM SELTZER APPEARED ON BEHALF OF THE COMPLAINANT.

JAMES H. PRESSNALL APPEARED PRO SE.

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board on a Motion for Reconsideration and Memorandum filed by the Illinois Environmental Protection Agency (Agency) on October 21, 1987. By that motion, the Agency has requested that the Board reconsider its September 17, 1987 Opinion in accordance with the Agency's Memorandum (herein cited as "Ag. Memo"). The Board's September 17, 1987 Opinion and Order found that the Agency improperly issued an administrative citation to James Pressnall. Accordingly, the Board struck the citation and dismissed the matter. Specifically, the Agency contests the Board's conclusion that administrative citations issued pursuant to Section 31.1 of the Illinois Environmental Protection Act (Act), may only be issued against facilities that are permitted as sanitary landfills. Section 31.1 is one mechanism by which the prohibitions of Section 21(p) may be enforced.

On November 19, 1987, the Board issued an Order stating that it would "reconsider" its September 17th Opinion and Order. However, the Board did not address the substantive arguments of the Agency Memorandum. Pressnall was given until December 1, 1987 to file a response to the Agency's motion. Pressnall never filed such a response. Today's Opinion and Order will dispose of the Agency's motion on its merits.

In its Memorandum, the Agency presents numerous arguments in an attempt to support its position.

First, the Agency states that the language of Section 21(p) of the Act is clear and unambiguous and that as a result, the Board is "prohibited from employing statutory construction analyses." (Ag. Memo., p. 2). The Agency goes on to state:

> The only reason stated by the Majority for broaching the issue of statutory construction is that this was the first contested administrative citation case that went before the Board, and is, therefore, a case of first impression. This is not legally sufficient reason for embarking upon statutory construction analysis. The Agency urges the Board to reexamine the language of Section 21(p), which does not display characteristics of ambiguity or lack of clarity. (emphasis added).
>
> (Ag. Memo, p. 3)

The Board agrees with the Agency that the language of Section 21(p) is unambiguous and clear. However, the Board does not agree that it embarked on "statutory construction analysis" in its September 17th Opinion and Order. The Board merely came to its conclusion after considering Section 21(p) in light of Sections 21(d) and 3.41.

Section 21(p) reads as follows:

> No person shall:...
>
> p) Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions: [The subsection then lists twelve specific conditions].
>
> Ill. Rev. Stat. 1986 Supp., ch. 111 ½, par. 1021(p).

Because this was a case of the first impression, the Board believed that it was necessary to determine the elements of Section 21(p) violation. To that end, the Board looked closely at the language of Section 21(p). In the September 17th Opinion, the Board found:

> A plain reading of the language of subsection (p) suggests that only sanitary landfill operations which are also subject to subsection (d) may be subject to subsection (p). (emphasis added).
>
> AC 87-6, slip. op. at 5.

After reviewing the language of Section 21(p) again, the Board finds no reason to deviate from its earlier conclusion.

In the previous opinion, the Board also concluded that the term "'sanitary landfill operation' is plainly read to be equivalent to the phrase 'operation of a sanitary landfill'." (emphasis added). The Board concluded that this plain reading of those words was appropriate, since the Act provided a statutory definition for "sanitary landfill" but not a definition for "sanitary landfill operation." In other words, the Board rejected the possibility that "sanitary landfill operation" in Section 21(p) meant something different than "an operation of a sanitary landfill". Here, too, the Board finds no reason change its position.

The Board is at a loss to determine how the Agency concludes that the Board has not utilized a plain reading of Section 21(p). However, the Agency contends that the Board's reading of Section 21(p) does indeed change "the entire meaning of the clear, unambiguous language of Section 21(p)." (Ag. Memo, p. 3). Specifically, the Agency asserts:

> Under a normal understanding of the language of 21(p), the Board had to consider only the factual issue of whether or not the Respondent was conducting a waste disposal operation as alleged by the Agency. If the Board had agreed with the Agency's allegation that Respondent was disposing of waste, then Respondent would have been required to have a permit pursuant to Section 21(d) of the Act, and would therefore be amenable to administrative citation enforcement. Id.

It is clear that the Agency's "normal understanding" of Section 21(p) substitutes the words "waste disposal operation" for the words "sanitary landfill operation". Also, the Agency's "normal understanding" seems to presume that if one is shown to be "disposing of waste", then one is "required to have a permit pursuant to Section 21(d) of the Act." However Section 21(d)(1) of the Act plainly states:

> [No personal shall]
>
> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> 1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder;

> provided, however, that no permit shall be required for any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated; or,
>
> 2. In violation of any regulations or standards adopted by the Board under this Act.
>
> This subsection (d) shall not apply to hazardous waste. (emphasis added).
>
> Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1021.

The Agency's "normal understanding" certainly rejects a plain reading of Section 21(p) and 21(d). The Agency's own Memorandum provides:

> No rule of construction authorizes a court [or the Agency] to decide that the Legislature did not mean what the plain language imports. Hill v. Butler, 1982, 107 Ill. App. (3) 721, 437 N.E. (2) 1307. (emphasis added).
>
> (Ag. Memo, p. 2).

The factors in 21(d) other than "disposing of waste" render the determination of whether or not a permit is required somewhat more complex than the Agency implies. Consequently, the Board questions the basis of the Agency's own interpretation of Section 21(p).

In seeking to determine exactly what type facility is subject to the prohibitions of Section 21(p), the Board had applied the statutory definition of sanitary landfill as set forth by Section 3.41. Without Section 3.41, there are no other statutory criteria by which to judge whether a facility is a sanitary landfill operation. Section 3.41 states:

> "Sanitary Landfill" means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the

> refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation. (emphasis added).
>
> Section 3.41 of the Act, Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1003.41.

The Agency concludes that the application of the statutory definition of "sanitary landfill" to Section 21(p) "would make the Legislature's language utterly redundant." (Ag. Memo, p. 4). Under the Board's interpretation, a sanitary landfill operation by its very definition is a permitted facility. The Agency reasons that such an interpretation renders the phrase "which is required to have a permit under subsection (d) of this Section [21]" superfluous. The Agency asserts that from its experience it can conclude that "only waste disposal facilities required to have Agency permits obtain permits." Therefore, according to the Agency, the Board's interpretation provides "a distinction without a difference." Id. The Agency sums the issue up by asserting:

> The question must be asked -- why did the Legislature pin the applicability of Section 21(p) to sites that are "required" to have a permit? The answer, of course, is that the Legislature used clear, unambiguous and commonly-understood language to set forth their intent and expectations that Section 21(p) apply not only to sites that have a permit, but to the larger universe of sites that are required to have a permit.
>
> (Ag. Memo, p. 5)

To the Board, it is clear and unambiguous that only a person conducting a sanitary landfill operation may be subject to this enforcement of Section 21(p) through the administrative citation process. The Agency claims that the phrase "which is required to have a permit under subsection (d)" precludes the application of the statutory definition of "sanitary landfill". The Board believes the statutory definition clearly applies in the context of Section 21(p). If the Board does not utilize the definition of "sanitary landfill" as provided by the Act, how is the Board to determine what constitutes a sanitary landfill operation? The Agency provides no alternative criteria in order to make such a determination. The Agency seems to suggest that the only criterion necessary for a facility to be subject to a Section 21(p) enforcement action is that the facility would be required to have a permit under subsection (d). If that is so, why did the legislature choose not to use the introductory language of

subsection (d) in subsection (p). In other words, rather than drafting the phrase "conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section," the legislature could have merely stated "conduct any waste-storage, waste-treatment, or waste-disposal operation." The Board is reluctant to ignore the plain reading of subsection (p) and interpret that language as merely being equivalent to the language found in subsection (d).

The Agency claims that a facility which is not required to have a permit would in actuality never obtain one. However, the Agency does not state that such an occurrence is a legal impossibility. Consequently, the Board's interpretation does not necessarily create a redundancy. Also, the phrase "which is required to have a permit under subsection (d)" could be interpreted as a further explanation as to why the facility must be permitted. Subsection (d) requires that certain facilities must be permitted. Use of the words, "sanitary landfill operation" insures that only facilities permitted pursuant to the requirements of subsection (d) may be the subject of Section 21(p) enforcement action.

Next, the Agency argues that the Board should have looked to the intent and purpose of the Act and reject the use of the statutory definition of "sanitary landfill". Essentially, the Agency argues:

> Considering the objectives of the Act, it is reasonable to assert that administrative citations apply to illegal dump sites and that it would be contrary to the objectives of the Act to exclude illegal unpermitted sites from the 21(p) process.
>
> (Ag. Memo, p. 7).

The Agency buttresses this conclusion with the statement that "[t]he same violation, whether committed by a permitted or unpermitted site, has the same environmental consequences." (Ag. Memo, p. 8).

The Board agrees with the Agency that actual environmental harm is not necessarily premised upon permit status. However, simply because a certain interpretation of the Act is consistent with the intent and purpose of the Act, it does not necessarily follow that the interpretation is proper in all contexts. Surely, it would be consistent with the overall intent and purpose of the Act to enforce all types of violations, for example violations concerning air and water, through the abbreviated enforcement process of an administrative citation; but the Act clearly does not provide for such an application. The Board notes that violations covered by the administrative citation process are in general easily determined by visual

inspection. The larger question of whether a site requires a permit is more properly considered in Section 21(d) enforcement proceeding. [sentence deleted].

In order to support its conclusion that Section 21(p) may be used to enforce against unpermitted facilitites, the Agency points to the language of Section 21(p)(7) which reads: "acceptance of waste without necessary permits". However, the Agency also provides an example when a permitted facility could still be in violation of Section 21(p)(7); acceptance of "special waste" requires a supplemental "special waste permit". The Agency claims that if the "Legislature intended 21(p)(7) to apply to 'special waste', it certainly would have so stated."

The Board is not convinced by the Agency's argument that the legislature did not intend 21(p)(7) to be enforced against an operation which is accepting special waste but not permitted to do so. The language of 21(p)(7) certainly does not preclude that option of enforcement. An operation is required to have a supplemental permit before it may legally accept special wastes. Also, there are different types of special waste supplemental permits which apply to specific categories of "special waste." That is, an operation may be permitted to accept certain types of special waste but not others. This could be one rationale why the legislature refrained from using the words "special waste". In any event, enforcement of a 21(p)(7) violation against a permitted facility is not a legal impossibility.

The Board has plainly read the language of the Act and finds that the administrative citation process only applies to permitted facilities. The Agency seems to imply that if the Board adheres to its September 17th decision, there will be no available enforcement route to take against unpermitted facilities. This is clearly wrong. There are several avenues open for enforcement against unpermitted sites.

Enforcement actions may be brought pursuant to Section 31. Depending upon the situation, actions dealing with non-hazardous waste could be based on the following provisions of the Act.

Section 21

No person shall:

a. Cause or allow the open dumping of any waste. [The Board notes that the Act provides a definition of open dumping.

Section 3.24

"OPEN DUMPING" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. (emphasis added).]

b. Abandon, dump, or deposit any waste upon the public highways or other public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board. (emphasis added).

c. Abandon any vehicle in violation of the "Abandoned Vehicles Amendment to the Illinois Vehicle Code," as enacted by the 76th General Assembly.

d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:

1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with the Act and with regulations and standards adopted thereunder; provided, however, that no permit shall be required for any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated; or,

2. In violation of any regulations or standards adopted by the Board under this Act.

This subsection (d) shall not apply to hazardous waste.

> e. Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. (emphasis added).

* * *

Consequently, the Board is not abandoning in any way the existing environmental enforcement process as provided by the Act; the Board is merely adhering strictly to the Act as it is written.

The Agency also attempts to support its position by citing Reynolds Metals Co. v. Illinois Pollution Control Board, 108 Ill. App. 3d 156, 438 N.E.2d 1263 (1982). Although Reynolds Metals does concern statutory interpretation in the context of the intent and purpose of the Act, it does not appear to be controlling concerning the outcome here. Reynolds Metals dealt with the Board's determination of whether a particular facility was required to have a permit under Section 21(d) of the Act. Unlike Section 21(b), Section 21(d) does not contain the words "sanitary landfill operation". Therefore, in Reynolds Metals, the Board was not faced with the same question which is at issue here. On appeal, the First District found that given the great potential for serious environmental harm, the Board properly found that Reynolds Metals could not be exempt from the permit requirement of Section 21(d). 438 N.E.2d at 1267.

The Agency further contends that the statutory definition of "sanitary landfill" should not apply to Section 21(p), due to the way the words "sanitary landfill" are used in other parts of the Act. This is an interesting position to take. On one hand, the Agency claims that the language of Section 21(p) is clear and unambiguous and that the Board need not look further than the words of Section 21(p). On the other hand, the Agency is seeking to convince the Board that it should interpret Section 21(p) based upon the way other sections of the Act utilize the words "sanitary landfill."

Specifically, the Agency points to Section 22.15(b). The language at issue is as follows:

> b. On and after January 1, 1987, and until and through June 30, 1989, the Agency shall assess and collect a fee in the amount set forth herein from the owner or operator of each sanitary landfill permitted or required to be permitted by the Agency to dispose of

> solid waste if the sanitary landfill is located off the site where such waste was produced and if such sanitary landfill is owned, controlled, and operated by a person other than the generator of such waste...(emphasis added).

A plain reading of this Section clearly indicates two types of sanitary landfills: those permitted or those required to be permitted. The Board agrees that in this context the strict statutory definition of sanitary landfill would not make much sense. But it is highly significant that this meaning is evident from a plain reading of the language of Section 22.15(b). It is important to note the use of the word "or" which clearly indicates two alternative types of facilities. Such a clear indication is lacking in Section 21(p). Consequently, Section 21(p) is plainly read to mean something different. The Board is constrained by existing language of Section 21(p).

Finally, the Agency argues that the utilization of the statutory definition of "sanitary landfill" would frustrate enforcement actions. In particular, the Agency asserts that if the definition provided by Section 3.41 is accepted in a strict way, many permitted facilities would not be subject to enforcement under Section 21(p) or Board regulations. The Agency cites as an example a permitted landfill which fails to apply daily cover to the site. The Agency reasons that since Section 3.41 describes a facility which applies daily cover, if a facility fails to apply such cover, it is no longer a "sanitary landfill". The Agency states that the Board's position would require such a result. In support of this conclusion, the Agency quotes from the Board's September 17th Opinion.

> In short, sanitary landfill operations include only those facilities that are permitted by the Agency and meet the other requirements of Section 3.41. Therefore, sanitary landfill operations that are subject to administrative citation enforcement of Section 21(p) must in the least be permitted by the Agency and fall within the other requirements of Section 3.41. (emphasis added).
>
> AC 87-6, slip. op. at 6.

On reconsideration, the Board believes that the above language could be rephrased to better reflect the intention of the Board. The above quotations should be replaced with the following:

> In short, as strictly defined, sanitary landfill operations include only those facilities that are permitted by the Agency. In order to be initially permitted, they must meet the other requirements of Section 3.41. Therefore, sanitary landfill operations that are subject to administrative citation enforcement of Section 21(p) must in the least be permitted by the Agency.

Section 39 of the Act provides that the Agency may not issue a permit to a facility if the facility's operation will cause violations of the Act or Board regulation. Section 3.41 states that a "sanitary landfill" is "a facility permitted by the Agency for the disposal of waste on land meeting the requirements of...." The Agency could not properly issue the permit if a facility did not meet the requirements of RCRA and the other items listed in the remainder of the definition, including daily cover. Once the Agency issues the permit, the violation of any of the requirements as prescribed by the remainder of Section 3.41 does not remove the facility from the category "sanitary landfill". The permitted facility is expected to meet those requirements. Violations of any permit conditions or prohibitions of Section 21(p) would not nullify "sanitary landfill" status nor prevent the enforcement of Section 21(p) requirements.

In addition, the Agency cites Illinois Environmental Protection Agency v. City of Marion, PCB 81-19, 41 PCB 281, 284 (September 3, 1981) as support for its contention that the Board's application of the statutory definition of "sanitary landfill" to Section 21(p) will frustrate enforcement efforts. In City of Marion, the Board found the City of Marion and two individual landowners to have violated certain provisions of the Act and Board regulations.[1] Among the violated Board regulations included those which applied to sanitary landfills. The landfill

[1] In City of Marion, the Respondents principally argued that the Agency unreasonably denied to the City of Marion a permit for the operation of a landfill. After reviewing the evidence, the Board concluded:

> Given that there is no competent testimony to rebut Mr. Mann's testimony and no meritorious defense has been presented, the Board finds that Respondents have violated all Rules and Sections of the Act cited in the complaint during the times alleged."
>
> IEPA v. City of Marion, PCB 81-19, 43 PCB at 283.

in question had never been permitted. The Agency reasons that if a strict Section 3.41 definition of sanitary landfill had been applied to Board regulations, the Board could not have found liability concerning the sanitary landfill regulations. The Agency reasoning seems to be correct in that instance, however, Section 3, which states that the statutory meanings of the terms in the Act should be adhered to unless the context clearly requires otherwise, would presumably apply. The same is not true in the instant matter.

The case presently before the Board concerns the Section 31.1 (administrative citation) enforcement of Section 21(p) of the Act. At the time of City of Marion neither of those Sections were contained in the Act. As a result, issues in the City of Marion were different than the one considered in this matter. The two cases are quite distinguishable.

The Board's holding of September 17th only addresses a plain reading of Section 21(p). The Board recognizes that the legislature, Agency, and Board, itself, may have in the past used the words "sanitary landfill" in a context that is not consistent with the definition of Section 3.41. However, this fact does not weaken the Board's finding that Section 3.41 applies to Section 21(p).

The Board emphasizes its belief that the administrative citation process applies to permitted facilities, sanitary landfills. The Agency attempt to use Section 31.1 at unpermitted sites "required to have a permit" will lead to major difficulties. The determination as to whether or not a site requires a permit is far more legally complex than whether the 12 conditions listed in Section 21(p) have been violated. If the Agency believes that a small pile of litter, trash dumped along a rural roadside, a salvage operation, or any other potentially illegal dumping should have a permit under Section 21(d), it should file an appropriate enforcement action.

In summary, the Agency has not convinced the Board that the Board's Order of September 17th in this matter was improper. To the extent consistent with this Opinion, the Board readopts the rationale set forth in the September 17th Opinion.

This Opinion and the Opinion of September 17, 1987, constitute the Board's findings of fact and conclusions of law in this matter.

## ORDER

After reconsideration of this matter, the Board hereby affirms its Order of September 17, 1987.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 ½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 17th day of December, 1987, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board