

ILLINOIS POLLUTION CONTROL BOARD
May 10, 1990

ST. CLAIR COUNTY,)
)
 Complainant,)
) AC 89-18 (Dockets A & B)
 v.) Administrative Citation)
) County No. 89-1 SC
 J & R LANDFILL, INC.,)
 An Illinois Corporation,)
)
 Respondent.)

DISSENTING OPINION FROM COUNT A (by J. Anderson, J. Dumelle, and M. Nardulli):

We respectfully dissent from the finding by the majority of a violation regarding Count A. We would have dismissed Count A. We do not believe that Count A constituted a violation of Section 21(p)(5) of the Act as alleged, and thus we believe that the use of the Administrative Citation "ticket" process for enforcement was inappropriate.

In an area where two feet of final cover has been applied, refuse subsequently exposed by loss of cover is a violation for failure to maintain closure/post closure care, not a violation of the six inch daily cover operating requirement listed in Section 21(p)(5) of the Act. We believe that the distinction is important.

The Board has recognized in prior proceedings that the violations listed in Section 21(p) are a subset of the Board's larger landfill regulations, and the statute itself clearly restricts the use of the expedited "ticket type" Administrative Citation enforcement alternative to violations contained on that list. When construing the violations listed in Section 21(p) in an Administrative Citation enforcement setting, the Board has looked to the nexus between those listings in the Act and the related Board regulations. Moreover, the Board has already identified the daily cover requirement in its regulations, 35 Ill. Adm. Code 807.305(a), as the nexus with Section 21(p)(5). Section 807.305(a) requires that six inches of cover "shall be placed on all exposed refuse at the end of each day of operation". Based on this reasoning, the Board has held that the amount of cover required by Section 21(p)(5) is six inches. In the Matter of: Dan Heusinkved, County Clerk, County of Whiteside, State of Illinois, AC 87-25, 85 PCB 247; In the Matter of: Village of Rantoul, AC 87-100, 92 PCB 539).

We also emphasize that the Board has, from the time it first adopted its landfill regulatory scheme in R72-5, always distinguished the daily, intermediate, and final cover operating

requirements found in Section 807.305 from its closure/postclosure maintenance requirements. St. Clair County makes no allegation that two feet of final cover had not been timely applied (which in any event would not have been a violation of Section 21(p)(5)), but rather a violation of 21(p)(6) whose nexus is with Section 807.305(c), not 807.305(a)).

Rather, the violation in this case is a closure/postclosure care maintenance violation for failure to re-apply the two feet of cover that was lost, and not failure to daily apply six inches of cover to refuse "remaining from any previous operating day or at the conclusion of any operating day...", as is required by Section 21(p)(5).

We of course share the majority's concern that the Act and all Board regulations be complied with. However, we believe that the Board should not over-reach, as we think the majority did here, when construing the scope of the statutory limitations on the use of the Administrative Citation provisions. We believe that the effectiveness of the citation process rests on its avoidance of complicated issues of fact and law; unlike regular enforcement actions, the proofs and Board determinations are quite limited.

We also believe our conclusions are supported as a matter of precedent (see IEPA v. Pressnall, AC 87-6, 81 PCB 307), and the historical interpretation of 21(p)(5) as a daily cover requirement. Because the citation legislation is constructed to be restrictive as an enforcement tool, we believe that the Board should be cautious about construing its provisions. We also do not believe that selectively isolating specific words, as the majority has done with Section 21(p)(5) in order to assert a "plain language" conclusion actually achieves that end. A careful reading shows that, by focusing on other words, such as "previous", "conclusion of" and "operating," different readings can be surmised; we suggest that the language, standing alone, is not clear on its face.

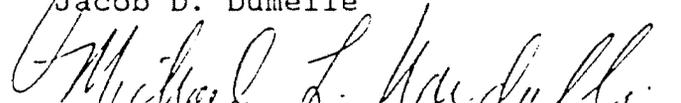
In conclusion, when the legislature provides a specific listing as a subset of an overall regulatory scheme as eligible for the Administrative Citation enforcement process, it is the legislature that should clearly expand the subset; it is the legislature that is the appropriate entity to add closure/postclosure activities such as abating gas, water or settling problems to the Administrative Citation list if it wishes.

Since Section 21(p)(5) is not applicable to the violations alleged, the citation as regards Count A should have been dismissed.

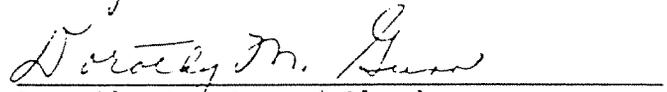
For the foregoing reasons, we respectfully dissent.


Joan G. Anderson


Jacob D. Dumelle


Michael L. Nardulli

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 10th day of May, 1990.


Dorothy M. Gunn, Clerk
Illinois Pollution control Board