

ILLINOIS POLLUTION CONTROL BOARD
November 20, 1980

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
Complainant,)
v.) PCB 79-271
GORDON FICKLIN, d/b/a Illini)
Sanitary Service,)
Respondent.)

STEVEN GROSSMARK APPEARED ON BEHALF OF THE COMPLAINANT.
GLENN A. STANKO APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

The Environmental Protection Agency (Agency) filed a complaint against Gordon Ficklin (Ficklin) on December 20, 1979, alleging permit, air pollution, and open burning violations under various sections of the Illinois Environmental Protection Act (Act), and various rules under Chapters 2 and 7 of the Board's Rules and Regulations (Air Pollution Rules and Solid Waste Rules, respectively). Public hearings were held on July 22 and 23, 1980.

At all times pertinent to the complaint, Ficklin has owned five acres of property located north of I-74 and east of Lincoln Avenue, in or near the city of Urbana, Illinois (R.48). It is alleged that Ficklin violated Section 21(e) of the Act and Solid Waste Rules 201 and 202(a) by causing or allowing the development of a solid waste management site without a permit since on or before January 1, 1979 to the date of filing of the Complaint. It is further alleged that he violated Sections 9 and 21 of the Act, Air Pollution Rule 502 and Solid Waste Rule 311 by allowing the burning of refuse disposed of at the site since on or about November 17, 1979, to the date of the filing of the Complaint.

The factual disputes are few and relate largely to mitigation rather than liability. There is no dispute that during the summer months of 1979 materials such as dirt, clay, gravel, concrete, brick, and asphalt have been deposited on Ficklin's land (site) to raise the level of the grade and make the site suitable for the construction of buildings. Ficklin admitted this (R.280-282) and several Agency photographs and attendant testimony confirm it (Compl. Ex's. 2-4). Ficklin further admitted "that some trash has been deposited" on his premises by persons other than himself (R.284-5). Ms. Grills, an

Agency Inspector, testified that between visits "an appliance, a wooden table, and some other wooden pieces" had been dumped on the site (R.110 and Compl. Ex. 15). She also testified to "concrete, paper, wood, plastics, and metal" exposed on the site (R.107 and Ex. 14, among others). The record contains considerable, un rebutted testimony concerning the debris on the site.

The first question that must be answered, then, is whether filling with this debris requires a permit. To decide that, the following definitions become important. "Solid Waste Management" is defined as "the processes of storage, processing or disposal of solid wastes" under Solid Waste Rule 104(u). "Solid Waste" is defined as "refuse" under Solid Waste Rule 104(s). "Refuse" is defined as "garbage or other discarded materials" under Solid Waste Rule 104(o).

Given these definitions, the Board finds that Ficklin has conducted refuse-disposal operations, operated a solid waste management site, and developed a new or modified solid waste management site without a permit in contravention of Section 21 of the Act and Solid Waste Rules 202(a) and 201, respectively, since Ficklin was never issued a permit (R.113 and admission in answer).

Ficklin argues that he only brought materials such as concrete, asphalt, clay, brick and mortar on to his property and that a permit should not be required for such materials (R.421). He also argues that any other materials were brought onto his premises without his permission (R.421), and that there is no indication of regular dumping activities (R.418). For those reasons he feels that no violation should be found.

However, under the above definitions, there is no exemption for materials such as concrete and asphalt. The case of Environmental Protection Agency v. Master Pattern, Inc. (PCB 75-477, 23 PCB 123, July 22, 1976) did carve out a narrow exception for concrete and rock where "the material is placed with sufficient dirt so that there are no interstices to harbor rodents or other animals that might serve as vectors or that might serve as an aquifer transmitting leachate," and where the potential for environmental harm is minimal. In this case, however, it appears that there were such interstices; otherwise the fire could not have started and burned for so long. Second, and for the same reason, there must have been a considerable amount of putrescible materials which further distinguishes the instant case from Master Pattern. A third distinguishing characteristic is that these materials have been dumped in a borrow pit which by its nature is quite susceptible to standing water. This, in turn, may cause leaching such that the potential for environmental harm is not minimal.

Further, the "cause or allow" language of Solid Waste Rules 201 and 202(a) precludes the argument that the materials were brought upon Ficklin's property without his permission and that no permit is, therefore, needed. Someone must be responsible for insuring that land is not subject to nuisance dumping, and that is the owner of the land. Finally, Ficklin himself testified that such dumping occurred nearly every weekend (R.350). It was therefore incumbent upon him to take such measures as were necessary to stop it.

The Board also finds that Ficklin violated Section 9 of the Act, Air Pollution Rule 502 and Solid Waste Rule 311 by conducting refuse-collection and refuse-disposal operations and causing or allowing open burning of those materials.

Ficklin again argues that he should not be held responsible for these violations because he did not start the fire. That may or may not be the case. Ficklin testified that the fire was caused by his neighbor, Mr. Jennings, when he was burning leaves near Ficklin's property line (R.342). He further testified that he could see where the fire "burnt right down the side of the ditch, across the ditch; burnt a few trees and got into my stuff--leaves and whatever--and started burning" (R.342). However, Mr. Jennings testified that he did not start the fire (R.203), that the fire was seventy or eighty feet west of his property line (R.217), that the wind was blowing away from Ficklin's property (R.220), that he was watching carefully to make sure the fire was out (R.222), and that he first noticed the fire on Ficklin's property two or three hours after he finished burning leaves (R.217).

Regardless of who started the fire, Ficklin by his own admission allowed it to continue to burn from November 17, 1979 (R.340-4) until at least January of 1980 (R.362). Ficklin testified that on November 26, 1979, Ms. Grills told him he would have to dig up the smoking area and then water it or cover it with dirt (R.345). However, that day he had another project underway and did not feel he "should drop that to put out some puffs of smoke" (R.346). He never did dig out the area, but rather continued piling "dirt on top of it; and really praying for rain" (R.347). Praying for rain and delaying further action until another project is completed is not sufficient to show that Ficklin did not allow the fire to continue. This is especially true where such burning is causing bad odors to be emitted into the air.

John C. Miles, an Agency Inspector, testified that he detected "a smell of garbage burning" on January 5, 1980 and on other occasions when the wind was blowing toward him from Ficklin's property (R.257). He described the smell as "pungent" (R.257) and on December 16, 1979, he noted that the smoke "was going across I-74 towards the country club" (R.253-4). Mr. Jennings also testified to "a garbage smell, rotten" coming from Ficklin's property during the summer of 1979 (R.188). Ficklin

himself testified that "there was a nasty odor out there through the winter and up until early spring" though he attributed it to garbage trucks which had been "burned up" elsewhere, but which he had on his property to be "rejuvenated" (R.358).

The Board finds that the Agency has met its burden of proof with respect to each of the violations alleged against Ficklin.

PENALTY

Despite the lack of merit in Ficklin's arguments regarding liability, they are mitigating with respect to any penalty that will be assessed. A consideration of Section 33(c) of the Act underscores this.

The first factor cited in the section is the character and degree of injury or interference with the health, general welfare or physical property of the people. Here, such injury was minimal. There were some odors, but the area is such that few people were affected (R.321-2). When Ms. Grills walked on the site, a small part of the ground once collapsed under her foot (R.83), but there is no indication that this was a substantial problem.

The second factor, the social and economic value of the pollution source, is not particularly applicable to this case. Mr. Ficklin did, apparently, increase the value of the land by partially filling what was a borrow pit (R.306), but there is no social value to allowing nuisance dumping.

Third, the pollution source is relatively well suited to the area in that the site was a borrow pit in a relatively unpopulated area, as discussed above.

Fourth, the technical practicality and economic reasonableness of eliminating the emissions or deposits of the pollution source are somewhat mitigating. Mr. Ficklin made substantial efforts both to stop the nuisance dumping and to put out the fire. During the winter of 1978-9 he put a cable across the road leading to his site, during the summer of 1979, he parked some of his equipment on the access road to block it, and in the fall of that year he cleared timber to make the site less attractive for such dumping (R.286-7). With respect to the fire, Ficklin paid approximately \$1200 to Jim Tull in an attempt to put it out (R.349). There is also considerable testimony that large amounts of dirt were brought in to cover the fire. There is no indication that the fire continues to burn.

However, Ficklin has not done enough. He must either find an effective means of stopping the nuisance dumping or take measures to properly dispose of it in a prompt manner. He must also obtain a permit if he intends to continue filling the land to insure that that filling is done in an environmentally safe manner.

The Board finds that a penalty is a necessary and appropriate aid to the enforcement of the Act. However, given that his conduct has not been grossly unreasonable, and that he has expended considerable money and effort to remedy the problem, the penalty will be set at \$250.


This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Gordon Ficklin, d/b/a/ Illini Sanitary Service, has violated Sections 9 and 21 of the Environmental Protection Act; Rules 201, 202(a) and 311 of the Pollution Control Board Rules and Regulations, Chapter 7: Solid Waste; and Rule 502 of the Pollution Control Board Rules and Regulations Chapter 2, Air Pollution.
2. Within 45 days of the date of this Order, Gordon Ficklin shall cease and desist from violating Section 21(e) of the Act and Board Rules 201 and 202(a) of Chapter 7: Solid Waste. This shall include taking such measures as are necessary to either prevent the nuisance dumping or to properly dispose of any newly dumped material in a prompt manner. This shall also include obtaining a permit if he intends to continue filling his land.
3. Within 90 days of the date of this Order, the Respondent shall pay, by certified check or money order payable to the State of Illinois, a penalty of \$250 which is to be sent to: Illinois Environmental Protection Agency, Fiscal Services Division, 2200 Churchill Road, Springfield, IL 62706.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 20th day of November, 1980 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board