BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT,	)	
	)	AC 06-39
Complainant,	)	AC 06-40
	)	AC 06-41
v.	)	**AC 07-25**
	)	(Administrative Citation)
SPEEDY GONZALEZ LANDSCAPING, INC., JOSE R. GONZALEZ, & 1601-1759 EAST 130TH STREET, LLC.	)	(Consolidated)
Respondents.	)	

CITY OF CHICAGO'S RESPONSE TO RESPONDENTS' MOTION TO RECONSIDER OR MODIFY FINAL ORDER

Complainant, the City of Chicago Department of Environment ("CDOE"), hereby submits the following as its Response to Respondents' July 8, 2009, Motion to Reconsider or Modify Final Order ("Respondents' Motion to Reconsider"). In support thereof, CDOE states as follows:

INTRODUCTION

In ruling on a motion for reconsideration, the Illinois Pollution Control Board (the "Board") considers factors including new evidence, or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. The Board has repeatedly observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Ameren Energy Generating Co. v. IEPA, PCB 09-21 (Mar. 19, 2009) (citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992)); Dynegy Midwest

Generation, Inc. v. IEPA, PCB 09-48 (Mar. 5, 2009); Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993).

The Board concluded in its June 4, 2009, Final Opinion and Order ("Final Order") that Respondents Jose R. Gonzalez ("Mr. Gonzalez") and 1601-1759 East 130th Street, LLC ("130th LLC") violated Sections 21(p)(1), (p)(2), (p)(3), and (p)(7)(i) of the Illinois Environmental Protection Act (the "Act") (415 ILCS 5/21(p)(1), (p)(2), (p)(3), (p)(7)(i) (2006)) on March 22, 2006 at 1601 East 130th Street in Chicago, Illinois (the "Site"). In the Respondents' Motion to Reconsider, Respondents failed to present: 1) newly discovered evidence which was not available at the time of hearing; 2) changes in the law; or, 3) errors in the Board's application of existing law. Furthermore, the Board's hearing and decision were in conformity with procedural due process requirements. Therefore, the Board should deny Respondents' Motion to Reconsider and order Respondents to come into full and immediate compliance with the Final Order.

ARGUMENT

A. Respondents 130th LLC and Mr. Gonzalez Caused or Allowed the Violations on March 22, 2006.

Respondents 130th LLC and Mr. Gonzalez both exercised sufficient control over the Site where the violations of the Act were observed that the Board properly held both Respondents liable for the violations. Furthermore, having determined that there were violations of the Act on the Site on March 22, 2006, the Board also properly concluded that the violations did not result from any "uncontrollable circumstances" that would serve to alleviate Respondents' liability. Although the Board previously considered and ruled on these issues, CDOE will briefly restate its position in order to correct inaccuracies in Respondents' Motion to Reconsider, as well as to highlight Respondents' statements that further support the Board's decision and Final Order.

It is uncontested that Respondent 130th LLC owned the Site on March 22, 2006. Compl. Post-Hearing Br. at 1, 4; see also Resp. Post-Hearing Br. at ¶ 1. The Board has repeatedly held that a landowner can be held liable for "causing or allowing" open dumping even if the landowner did not actively participate in the dumping. See IEPA v. Shrum, AC 05-18 (IPCB Mar. 16, 2006); IEPA v. Carrico, AC 04-27 (IPCB Sep. 2, 2004); IEPA v. Rawe, AC 92-5 (IPCB Oct. 16, 1992). Respondent claims that fly-dumpers and E. King dumped waste at the Site without Respondent's permission and that there was waste on the Site when Respondent purchased it. Resp. Post-Hearing Br. at ¶ 9. 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 addition, "passive conduct" on the part of a landowner can amount to "acquiescence sufficient to find a violation of Section 21(a) of the Act." IEPA v. Shrum, AC 05-18 (IPCB Mar. 16, 2006).

In addition to not preventing others from dumping waste on the Site, Respondent 130th LLC is liable for violating the Act by not promptly removing the waste located on the Site when Respondent acquired it in January 2005. Respondent's counsel admits that "[w]hen [Respondent] acquired the property is [sic] was loaded with junk" and that there were "tires, signs and material...on the property when purchased." Resp. Post-Hearing Br. at ¶¶ 1, 9. In addition, Respondent's counsel admits that there was "trash that was constantly being fly-dumped" on the Site. Id. at ¶ 9. Therefore, Respondent 130th LLC, as owner of the Site, is liable for the violations observed on March 22, 2006 because Respondent 130th LLC failed to prevent others from dumping waste on the Site and failed to promptly address any dumping that did occur.

Respondent's counsel admits that Respondent Mr. Gonzalez also "acquired an interest in [the] property located at 1601-1759 East 130th Street." Resp. Post-Hearing Br. at ¶ 1. Even though Respondent Mr. Gonzalez is not the owner of record for the Site, the Board has held that ownership of property is not a prerequisite to violating Section 21(p) of the Act. See IEPA v. Cadwallader, AC 03-13 (IPCB May 20, 2004); IEPA v. Pekarsky, AC 01-37 (IPCB Feb. 7, 2002). A complainant must show that the alleged open dumper had control over the source or site of pollution. Id. As set forth in CDOE's Post-Hearing Brief, Respondent Mr. Gonzalez had extensive control over the movement of trucks, people and materials onto and off of the Site. Compl. Post-Hearing Br. at 4-5. Despite Respondent's statement that "Mr. Gonzalez was not on site when the investigators appeared" (Resp. Post-Hearing Br. at ¶ 3), CDOE presented testimony and evidence that Respondent Mr. Gonzalez was on the Site on March 22, 2006 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.

While attempting to argue that Respondent Mr. Gonzalez lacked sufficient control over the Site to be liable under the Act, Respondent's counsel admits that Respondent Mr. Gonzalez "repeatedly secured the property, put down a gravel road and was in the process of cleaning the property for purposes of future development" at the time of CDOE's March 22, 2006 inspection. Resp. Post-Hearing Br. at ¶ 34. Respondent's counsel also admits that "Mr. Gonzalez offered to rent the land to E. King" (Resp. Post-Hearing Br. at ¶ 12) – as established at hearing, E. King dumped large quantities of general construction and demolition debris on the Site. As these admissions and the other evidence cited in CDOE's Post-Hearing Brief demonstrate, Respondent Mr. Gonzalez clearly assumed the responsibility for securing, maintaining, developing, and

renting the Site – all of which demonstrate that Respondent had control over the source or site of pollution and was properly found liable by the Board for violating the Act.

Respondents' various arguments present no new facts or law. Further, the Board was completely briefed on all the arguments presented by Respondents' Motion to Reconsider during the hearing and in the post-hearing filings. Respondents merely reargue issues already raised and briefed prior to the Board's Final Order because Respondents are presumably dissatisfied with the Board's conclusions. The Board addressed each of Respondents' arguments in its detailed March 19, 2009, Interim Opinion and Order and in its Final Order and there is no justification to grant Respondents' Motion to Reconsider.

B. Respondents Received A Fair Hearing Before The Board.

Respondents allege that they were denied procedural due process because, in response to a subpoena requesting documents related to the case against Respondents, CDOE did not give Respondents "field notes" or business cards specifying the identity of the truck drivers and other employees of E. King Hauling or Paschen Construction that were on the Site on March 22, 2006. Resp. Motion to Reconsider at ¶¶ 31-32; see also AC 06-39, May 9, 2007, Tr. at 58-9 (CDOE Inspector Maciel's statements regarding the identification of E. King Hauling and Paschen Construction employees on the Site on March 22, 2006). As stated by the Board in its March 19, 2009, Interim Opinion and Order (at 9), "[t]he Act, by its terms, does not require that the complainant issue administrative citations to every possible respondent for a given occurrence" and CDOE's issuance of administrative citations to particular parties is "within CDOE's prosecutorial discretion." Therefore, CDOE's investigation regarding other possible respondents on the Site on March 22, 2006 is simply not relevant with respect to 130th LLC and Mr. Gonzalez's liability in the instant case before the Board.

Even if there were field notes or business cards that were somehow responsive to Respondents' subpoena, Respondents have failed to demonstrate that the alleged nondisclosure of such materials prejudiced them or violated their procedural due process rights in any way. Respondents speculate that the field notes or business cards would have allowed them to identify witnesses on the Site on March 22, 2006 that could have testified on Respondents' behalf. Resp. Motion to Reconsider at ¶ 32. Not only did the Board properly find that the Respondents were granted multiple hearings to solicit cross-examination testimony about the March 22, 2006 site inspection (since the four original cases were consolidated into one case post-hearing), but the witnesses Respondents hoped to identify were the officers or employees of E. King Hauling and Paschen Construction – the entities Respondents themselves contracted with to bring waste onto Respondents' Site. Therefore, Respondents were given ample opportunity to cross-examine adverse witnesses in conformity with due process requirements and were in the best position to seek testimony from the officers or employees of their business partners that were on the Site on March 22, 2006.

In order to comport with procedural due process requirements, respondents before the Board should receive "the essential elements of a fair hearing before an administrative agency: an opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence." Ardt v. Dept. of Prof'l Regulation, 218 Ill. App. 3d 61, 69, 578 N.E.2d 128, 133 (1st Dist. 1991) (holding, *inter alia*, that administrative hearing did not violate plaintiff's due process rights despite the fact that defendant state agency did not respond to plaintiff's interrogatories) (citing Mahonie v. Edgar, 131 Ill. App. 3d 175, 476 N.E.2d 474 (1st Dist. 1985)). Consistent with this well-established holding and as the Board has already

concluded, any alleged discovery omissions would have been harmless error and Respondents received a fair hearing in accordance with due process.

CONCLUSION

Respondents have not presented any new evidence, law, or legal analysis to refute the Board's conclusion that Respondents 130th LLC and Mr. Gonzalez violated Sections 21(p)(1), (p)(2), (p)(3), and (p)(7)(i) of the Act. In addition, the Board provided Respondents a fair hearing in conformity with procedural due process requirements. Therefore, the Board should deny Respondents' Motion to Reconsider and order Respondents to come into full and immediate compliance with the Final Order.

Respectfully submitted,

CITY OF CHICAGO
DEPARTMENT OF ENVIRONMENT

Mara S. Georges,
Corporation Counsel, City of Chicago

By: _____
JENNIFER A. BURKE

Dated: July 22, 2009

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NOTICE OF FILING

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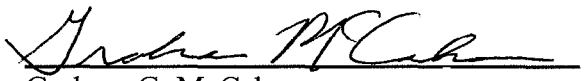
PLEASE TAKE NOTICE that on July 22, 2009, Complainant filed with the Clerk of the Illinois Pollution Control Board the attached CITY OF CHICAGO'S RESPONSE TO RESPONDENTS' MOTION TO RECONSIDER OR MODIFY FINAL ORDER, a copy of which is served upon you.



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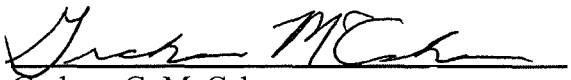
CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on July 22, 2009, he caused copies of this notice and the documents referenced therein to be served on the persons listed above by U.S. Mail, first class postage prepaid.



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