BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Complainant, v. JAMES REICHERT LIMITED FAMILY PARTNERSHIP, Respondent.	)	AC 16-7 IEPA No. 344-15-AC

ORIGINAL

NOTICE OF FILING

To: Michelle M. Ryan
IL Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794-9276

Carol Webb, Hearing Officer
Illinois Pollution Control Board
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that on this date I forwarded, via Certified Mail, Return Receipt Requested, for filing with the Clerk of the Pollution Control Board of the State of Illinois the following instrument entitled: POST-HEARING BRIEF OF RESPONDENT.

RONALD E. OSMAN & ASSOCIATES, LTD.

Dated: August 3, 2016

By: Ronald E Osman
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Counsel for James Reichert
Limited Family Partnership

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PROOF OF SERVICE

I hereby certify that I did on the 3rd day of August, 2016, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing instrument entitled NOTICE OF FILING to:

John Therriault, Clerk
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

Michelle M. Ryan
IL Environmental Protection Agency
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Ronald E. Osman
Ronald E. Osman

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 16-7
JAMES REICHERT LIMITED FAMILY PARTNERSHIP,	)	(IEPA No. 344-15-AC)
Respondent.	)	

POST-HEARING BRIEF OF RESPONDENT

An Administrative Citation was issued to Respondent James Reichert Limited Family Partnership on December 11, 2015, by the Illinois Environmental Protection Agency ("IEPA") asserting allegations of open dumping of waste resulting in litter, open burning and deposition of construction or demolition debris at 1406 Cornell Street, Marion, Williamson County, Illinois ("Subject Property") in violation of 415 ILCS 5/21(p)(1), (p)(3) and (p)(7).[1] (Respondent Exhibit 2) The Subject Property is owned by Respondent. Tr. 9:22-24, 47:15-22. During all times relevant to these inspections, both units of the Subject Property had been leased by Respondent to third parties – Airgas (Unit A) and a satellite company (Unit B). Tr. 48:4-7, 51:2-6.

The Administrative Citation against Respondent is groundless as it is based on nothing more than hearsay. The Narrative Inspection Report and testimony given by the IEPA Field Inspector at hearing indicates the only evidence IEPA has regarding Respondent's alleged engagement in pollution activities come from the occupant of Unit A of the Subject Property, who informed the IEPA Field Inspector that Respondent

[1] The Complainant's Post-Hearing Brief states the citation was issued on December 30, 2014; however, as the Illinois Pollution Control Board's file on this matter will indicate, the citation was actually issued on December 11, 2015.

chose to burn waste left in Unit B by a previous tenant rather than dispose of it properly and that Respondent's Manager, James Reichert, telephoned her to report he would be burning pallets behind Unit B of the Subject Property. IEPA Exhibit 1, p. 3; Tr. 28:20-29:6, 31:12-15. IEPA has found no actual evidence that Mr. Reichert, had anything to do with the "open dumping" or burning of the materials other than those statements. Tr. 34:8-15. The statements by the Unit A occupant constitute hearsay and are not admissible in this matter under either the Illinois Rules of Evidence or the Pollution Control Board's relaxed evidence standard set forth in 35 Ill.Adm.Code 101.626(a). After those hearsay statements are disregarded, IEPA has no evidence to indicate Respondent participated in the alleged pollution activities on the Subject Property, requiring a finding for Respondent.

Further, the evidence presented at the hearing on the Administrative Citation held before Hearing Office Carol Webb on June 8, 2016, indicates a finding that Respondent did not violate the Environmental Protection Act is proper. At the hearing, the IEPA Field Inspector testified that the citation was being pursued against Respondent on two basis. First, IEPA is basing its charges on the statement of a tenant of the Subject Property that Respondent chose to burn items left behind by a prior tenant and that Respondent's manager, James Reichert, had called to alert her he would be burning pallets behind Unit B of the Subject Property. Tr. 28:20 - 29:6, 30:12-15. Again, this assertion fails as the statements of the tenant of the Subject Property are hearsay and must be excluded from evidence.

Finally, IEPA is attempting to hold Respondent responsible for the violations solely because it owns the property. Tr. 34:22-23. In contradiction to the stated policy

of the local IEPA Office and Field Inspector, the State of Illinois does not recognize strict liability against landowners for alleged violations of the Environmental Protection Act. *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793 (5th Dist. 1993) Illinois law and Pollution Control Board precedent both indicate it must be shown that Respondent exercised control over either the pollution source or the property upon which the pollution occurred at the time of the occurrence. *Davinroy Contractors*, 793; *Illinois EPA v. Larry Bittle, et al.* (August 16, 1987), PCB No. 83-163. The record is void of any evidence indicating that Respondent exercised such control and a finding of liability on this basis is not warranted.

ARGUMENT

1. Respondent should not be held liable for violations based on exclusively on hearsay evidence.

Rule 801 of the Illinois Rules of Evidence define "hearsay" as:

> A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fed.R.Evid. 801. Such statements are inadmissible in trials and hearing in Illinois courts except in very limited circumstances as outlined by statute. Fed.R.Evid. 801.

The purpose of the hearsay rule is to "test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered." *People v. Carpenter*, 28 Ill.2d 116, 121 (1963). "While the administration of an oath and the right of confrontation are also spoken of as necessary elements, the essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose asserts are office to prove the truth of the act asserted." *Id.*(internal citations omitted).

> The distinction between admissible testimony and that which is barred by the hearsay rule is well illustrated by Wigmore's[2] example of the witness A testifying that "B told me that event X occurred". If A's testimony is offered for the purpose of establishing that B said this, it is clearly admissible - - if offered to prove that event X occurred, it is clearly inadmissible, for the probative value rests in B's knowledge - - and B is not present to be cross-examined.

Id.

Hearings before the Illinois Pollution Control Board are also subject to this "hearsay rule". See 35 Ill.Adm.Code 101.626 which provides "the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part." The hearsay rule applied, however, is a "relaxed standard" under the Pollution Control Board's procedural rules, providing that "[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged." 35 Ill.Adm.Code 101.626(a); *People of the State of Illinois v. Atkinson Landfill Co.* (January 9, 2014), PCB No. 13-28, at 25-26. Even under the relaxed standard, material is properly disregarded as hearsay when it is not such that "prudent persons in the conduct of serious affairs" would rely upon. *Atkinson Landfill Co.* at 27.

At hearing in the instant matter, IEPA admitted as its Exhibit 1 the Open Dump Inspection Checklist issued by the IEPA Field Inspector as well as testimony from the Field Inspector for the purpose of proving the responsibility of Respondent for the alleged violations. Both items are based upon statements made by third parties which

[2] The Illinois Supreme Court was referring to Wigmore on Evidence, 3rd ed. Sec. 1361, *et seq.* by this reference. *Carpenter*, 121.

were not called by IEPA to provide testimony at the hearing, thereby denying Respondent the right to cross-examine the persons allegedly making the statements.

To date, it has not been determined by Respondent how IEPA became aware of an alleged pollution source on the Subject Property. Respondent first became aware of the issue upon receipt of the December 11, 2015, Administrative Citation from IEPA. Tr. 54:1-4. The IEPA investigation, however, had begun on October 1, 2015, with an inspection of the Subject Property by an IEPA Field Inspector, resulting in a finding of an "open dumping" site at which items had been burned. IEPA Exhibit 1, p. 3; Tr. 22:6-22. IEPA allegedly sent a "noncompliance advisory letter" to Respondent in October 2015 as a result of this inspection. Tr. 21:22-24. Respondent, however, never received such a letter. Tr. 48:19-23. IEPA asserted at the hearing that it had documentation in its file regarding the noncompliance letter being sent to Respondent, but did not bring it to the hearing "[b]ecause it's not pertinent." Tr. 21:15 – 22:22.

Respondent's tenant in Unit A of the Subject Property, Airgas, Inc. ("Airgas"), did receive the IEPA's noncompliance advisory letter notifying it that it was a respondent in the IEPA's investigation of the potential violations. Tr. 31:22 – 32:5. Airgas responded to the letter both verbally and in writing, with the IEPA Field Inspector ultimately meeting with the Director of Environmental Safety for Airgas as well as the local Airgas office manager. Tr. 23:21-24:8, 25:3-6. During the meeting, the IEPA Field Inspector was told that the portion of the Subject Property involved was not part of their rental property and the Airgas manager had received a phone call from James Reichert to give her

notice that he was going to be burning pallets in the back in either May or June.[3] Tr. 26:9-20, 28:22 – 29:6. Airgas was dropped as a respondent to the citation based solely upon the IEPA Field Inspector's understanding that they only rented Unit A of the Subject Property, they had a lean-to containing compressed gas cylinders and in her opinion it would be silly to burn right next to where gas cylinders were stored. Tr. 32:18 – 33:7.

IEPA took no steps to substantiate the claims of Airgas, not even obtaining a copy of its lease with Respondent. Tr. 32:6-9. Instead, the IEPA Field Inspector assumed the Airgas employees were telling the truth, testifying that "I took their word for it since they have a big business sign up there." Tr. 32:10-13.

There can be no doubt that the statements made by the Airgas employees and relied upon by IEPA to place liability on Respondent constitute hearsay – out of court statements indicating that Respondent engaged in unlawful activity.[4] For example, in the matter of the *People of the State of Illinois v. Atkinson Landfill Co.* (January 9, 2014), PCB No. 13-28, a respondent was charged with disposing of leachate at publicly owned wastewater treatment facilities and filed a motion to dismiss the charge, attaching affidavits from its truck drivers indicating the drivers had been instructed by employees of the municipalities owning the wastewater treatment facilities to discharge the leachate into places other than their respective sewer treatment plants. *Atkinson Landfill Co.* at 3, 15-16. The State requested the Pollution Control Board strike those

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[3] The Airgas individuals gave written statements to the IEPA Field Inspector. Tr 27:13-16. The statements were not, however, introduced into evidence by IEPA at hearing or even brought to the hearing by the IEPA Field Inspector. Tr. 30:2-4.

[4] In addition, in this instance the hearsay is also suspect as it was obtained by the IEPA during the investigation of an IEPA violation by the hearsay speaker, Airgas. Based solely upon these hearsay statements, Airgas was dismissed as a respondent to the citation. Tr. 32:18 – 33:7.

affidavits as hearsay. *Id.* at 16-17. The Pollution Control Board found that the affidavits clearly qualified as hearsay, stating:

> Under Illinois law, hearsay is defined as "testimony in court or written evidence, of a statement made out of court," offered for the truth of the matter asserted, and "thus resting for its value upon the credibility of the out-of-court asserter." The references in the Hull affidavit to statements by a Village employee and an ALC manager clearly fall within this category: they are out-of-court statements offered to show that ALC lawfully discharged leachate into the Village STP on a particular date. The same is true of the Vardijan affidavit's recitation of oral instructions by a Galva sewer official and its implicit reliance on statements that other ALC truck rivers also discharged leachate into the Galve WWTF at the same "designated discharge point."

Id. at 23-24(internal citations omitted).

The Pollution Control Board then turned to a determination as to whether the affidavits could be admitted into evidence under the relaxed standards it recognizes. The Board noted it had previously found out-of-court statements admissible under the relaxed standards - items such as a letter from a laboratory technician providing testing results, a compilation of noise complaints received by a police department and air quality monitoring results. *Id.* at 26 (internal citations omitted). The Board concluded that the truck driver affidavits at issue were not of the same nature, stating:

> The statements at issue here are not of this character. There has been no showing that the municipal POTW employees who purportedly made the statements had authority to designate discharge points for either facilitie, and the Board otherwise believes the statements are not of a type that would be relied upon by "prudent persons in the conduct of serious affairs." Rather, they are oral, on-the-spot remarks by third parties who have not been subject to examination in this case. Accordingly, the Board finds the affidavits are not admissible under 35 Ill.Adm.Code 101.626(a).

Id. at 26-27.

Similarly, the Airgas statements indicating Respondent played a part in the "open dumping" and burning of materials are not the type of statements "prudent persons in

the conduct of serious affairs" would base liability for violations. The IEPA Field Inspector testified at hearing that the IEPA has no evidence that James Reichert ever burned anything at the property and no evidence that pallets were even present behind Unit B. Tr. 34:8-15, 21:12-14. The sole basis for liability arises from statements made by a tenant's manager who is known to not get along with Respondent's manager. Tr. 51:19 – 53:1 IEPA's Exhibit 1 and all testimony from the IEPA Field Inspector regarding these statements should accordingly be excluded from evidence in this matter. After that exclusion, IEPA has no evidence which indicates Respondent participated in "open dumping" or burning of waste materials, necessitating a finding for Respondent in this matter.

2. <u>Liability does not attach to Respondent solely because it is the owner of the Subject Property.</u>

The second basis for liability asserted by IEPA is that Respondent is liable solely because it was the owner of the property upon which the alleged pollution occurred. Neither the State of Illinois nor the Pollution Control Board, unlike the local IEPA Office and its field inspector,[5] recognize a theory of strict liability against landowners for

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[5] It is disturbing to this writer that the local IEPA Office has apparently interpreted the control aspect of IEPA regulations differently from the prior Pollution Control Board interpretations and Illinois case law. The exact language from IEPA Maggie Stevenson's sworn hearing testimony in this regard reads as follows:

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Am I understanding you correctly that in your position as an inspector that you believe that just because someone is a property owner they then are liable for causing any of the violations of the Illinois EPA?

A. Yes.

Q. Okay. And who advised you of that?

alleged pollution. *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793 (5th Dist. 1993); *Phillips Petroleum Company v. The Pollution Control Board*, 72 Ill.App.3d 217, 220 (2nd Dist. 1979); *Illinois EPA v. Larry Bittle, et al.* (August 16, 1987), PCB No. 83-163, slip op. at 10; *Casterllari v. Prior* (May 28, 1987), PCB No. 86-79, slip op. at 6-7. Instead, "[t]he State must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." *Davinroy Contractors*, 793.

As noted above, during all times relevant hereto, both units of the Subject Property had been leased by Respondent to third parties – Airgas (Unit A) and a satellite company (Unit B). Tr. 48:4-7, 51:2-6. It is well established in Illinois law that "[a] lease is a conveyance of property which ends the lessor's control over the premises." *Wright v. Mr. Quick, Inc.*, 109 Ill.2d 236, 238 (1985)(internal citation

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A. My management.
Q. Who is your management?
A. My management is - - I have had three managers in Marion and one out of Springfield. My current manager is John Richardson.
Q. Okay. Do you have - - did you receive a directive from any of these managers that said that?
A. Yes. That's the interpretation.
Q. Okay. And do you remember when you received it?

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A. It started in 2006 in February. So I would say it was 2006, February.
Q. Okay. So it matters not what the landowners knows, did, just as long as somebody does something that violates the IEPA on their property, they are liable?
A. Yes.

Tr. 35:5 – 36:7.

omitted). The Pollution Control Board has long recognized this principal of Illinois law, noting on numerous occasions that:

> The requisite control which would impose liability on the landowner does not automatically stem from the lessor-lessee relationship. Ownership of land, used pursuant to a lease, is alone not sufficient to support the imposition of liability upon the lessor for actions of the lessee.

Illinois EPA v. Larry Bittle, et al. (August 16, 1987), PCB No. 83-163, slip op. at 10; *Casterllari v. Prior* (May 28, 1987), PCB No. 86-79, slip op. at 6-7. Thus, the question to be determined in the instant matter is whether Respondent exercised sufficient control over the alleged pollution source or the Subject Property in order to invoke liability under the Act. *Davinroy Contractors*, 793.

The violations alleged by IEPA occurred behind Unit B of the Subject Property. At the time of the occurrence, Respondent had relinquished control over Unit B to its lessee, a satellite company, in accordance with Illinois landlord-tenant law. As noted by IEPA's Narrative Inspection Report attached to its Open Dump Inspection Checklist, the contents of the "open dumping" site were:

> solid waste and general construction demolition debris in the form of charred remains of dimensional lumber, nails, and various metals **similar to those used in the installation of TV satellite dishes**.

IEPA Exhibit 1, p. 3 (emphasis added). At hearing, the IEPA Field Inspector testified that the contents of the "open dumping" site included "satellite metal holders that hold satellite dishes up for things like Dish TV, Direct TV, that type of thing" and that she "[has] a picture of open burning and materials related to satellite." Tr. 11:16-21, 15:22 – 16:2. Such waste is consistent with the operation of a satellite company – the very type of business being operated by the lessee of Unit B at the time the alleged pollution occurred.

IEPA has no evidence that Respondent allowed its tenant to engage in "open dumping" or burning of materials. Tr. 34:8-23. In fact, IEPA has no evidence that Respondent's manager, James Reichert, had anything to do with the "open dumping" or burning of the materials other than a hearsay statement from the tenant in Unit A of the Subject Property that Mr. Reichert was planning to burn pallets behind the property. Tr. 34:8-15.

At hearing, Respondent's manager testified that he at no time took any type of material to the property for burning. Tr. 53:18-20. In fact, Respondent was not aware that material had been burned on the property until such time as it received the December 11, 2015, Administrative Citation from IEPA. Tr. 54:1-4. Respondent acknowledges, as noted by IEPA in its Post-Hearing Brief, that the Illinois Environmental Protection Act ("Act") does not require that knowledge or intent be proved to establish a violation of its provisions. IEPA Brief, p. 6; *People v. Fiorini*, 143 Ill.2d 318, 336 (1991). IEPA must prove, however, that Respondent had control over the pollution source in order to attach liability.[6]

For example, in the matter of *Phillips Petroleum Company v. The Pollution Control Board, et al.*, 72 Ill.App.3d 217 (2nd Dist. 1979), a petroleum company appealed a decision by the Pollution Control Board finding it liable for Environmental Protection Act violations arising from a train derailment which resulted in the puncture of a tank car and the release of anhydrous ammonia into the air. *Phillips Petroleum Company v. The Pollution Control Board, et al.*, 72 Ill.App.3d 217, 218-219 (2nd Dist. 1979). The petroleum company owned the tank car and had filled it with the anhydrous ammonia,

[6] In this instance, since the Lease Agreement between Respondent and the Lessee of Unit B has not been introduced into evidence, IEPA has transferred the burden of proof to prove control from the IEPA to the Respondent to prove that it did not have control.

but had transferred control of the tank car to a railroad company for transportation purposes. *Id.*, 219. The railroad company had put the car onto the train and maintained control over the car until the train derailment. *Id.*

The Second Circuit Court of Appeals reversed the Pollution Control Board's assignment of liability to the petroleum company, finding that the petroleum company did not control the source of pollution in any way which resulted in pollution occurrence. *Id.*, 220-221. The Court stated:

> While it is true that the Environmental Protection Act is *malum prohibitum*, this factor addresses only the lack of necessity of proving knowledge or intent. We have found no case which imposes strict liability on an alleged polluter. Among other factors in *Meadowlark*, the evidence showed that the alleged polluter had capability of controlling the pollution; even in *Bath, Inc. v. Pollution Control Board* (1973), 10 Ill.App.3d 507, 294 N.E.2d, 778, the alleged polluter was at least in control of the premises on which the pollution occurred, although he denied knowledge of it. The record in the present cause does not show any admissible evidence which indicates that [the petroleum company] exercised sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution. Lacking evidence to support the order, the opposite conclusion is clearly evidence and we hold that it was error to find [the petroleum company] in violation of section 9(a).

Id.

As with the petroleum company in *Phillips Petroleum*, Respondent had no control over the source of the pollution at the time it occurred. The IEPA Field Inspector noted in her inspection report and testified at hearing that the materials in the alleged "open dumping" site were materials utilized in the installation of TV satellite dishes and similar items. IEPA Exhibit 1, p. 3; Tr. 11:16-21, 15:22 – 16:2. The lessee of Unit B of the Subject Property at the time of the alleged pollution was a satellite television installer. Tr. Tr. 48:4-7, 51:2-6. IEPA has submitted no evidence that Respondent caused or allowed the pollution other than hearsay statements from the lessee of Unit A of the

Subject Property. IEPA has not made a showing that Respondent exercised control over the source of pollution at the time it allegedly occurred.

IEPA has similarly failed to make a showing that Respondent maintained the necessary control over the Subject Property at the time of the alleged pollution to justify assessment of liability to it on that basis. Such a liability assessment to a lessor for Environmental Protection Act violations by a lessee was the subject of the matter of the Pollution Control Board's ruling in the matter of *Illinois EPA v. Larry Bittle, et al.* (August 16, 1987), PCB No. 83-163. In *Bittle*, a lessor disputed liability being assessed to him for violations of the Illinois Environmental Protection Act by the lessees performing a carbon recovery operation on his property. *Bittle* at 7-8. IEPA alleged the lessor had maintained sufficient control over the property to invoke liability by virtue of two paragraphs of the lease agreement which provided the lessor to terminate the lease if lessee failed to comply with all state and federal laws, rules and regulations pertaining to their carbon recovery operations. *Id.* at 16. The Illinois Pollution Control Board disagreed with IEPA, noting that the control had by the lessor did not arise until after the lessor became aware that the lessees were in violation of an applicable law, rule or regulation and it would have been unreasonable for him to exercise that control by terminating the lease without knowledge the lessees were in violation of that lease provision. *Id.* at 17. The Illinois Pollution Control Board found that the lessor had no reason to believe the lessees were not operating within the confines of the Environmental Protection Act as the lessees had experience with the type of work being performed and the lease required them to obtain all necessary permits and that it was not until the IEPA required the lessor provide information on the lease that he could be

expected to become aware of the problem. *Id.* at 18. Accordingly, the lessor could only be liable for violations after he became aware of the potential violations. *Id.* at 19.

In this instance, Respondent leased its property to a third party – a satellite installation company. By entering into that lease, Respondent relinquished control of the property to the satellite installation company. Respondent had no reason to believe an established satellite installation company would violate Environmental Protect Act regulations regarding the disposal of its installation materials. Despite IEPA's assertions that it notified Respondent in October 2015 of the pollution violations, Respondent never received such notification and IEPA offered no evidence at hearing that it had actually been sent. Tr. 48:19-23, 21:15 – 22:22. Respondent did receive IEPA's November 4, 2015, inspection report. Tr. 48:24 – 49:20. When Respondent received that inspection report in November 2015, its manager called the IEPA Field Inspector, asked what he should do to correct it and was told to "clean it up." Tr. 24:19-24, 49:22 – 50:13. Respondent cleaned up the property in December 2015 and reported the same to the IEPA Field Inspector in December 2015. Tr. 36:21 – 37:5.

Respondent would like to note that the Pollution Control Board precedent cited by IEPA in its Post-Hearing Brief is distinguishable from the instant matter. First, IEPA cites to *Illinois EPA v. Shrum*, AC 05-18 (March 16, 2006) in support of its assertion that a landowner can be held responsible for "causing or allowing" open dumping even if the landowner did not actively participate in the dumping. In *Shrum*, the property at issue was in control of the owner at all times relevant to the pollution. The "open dumping" items which were the subject of the violation notice were present on the property at the time of the owner's purchase. The owner took steps to remove some of the "open

dumping" items, but left a majority of the materials on site. The Pollution Control Board found the property owner's inaction to remedy waste disposal on the land constituted the owner allowing litter to accumulate on his property. *Shrum,* generally.

IEPA citations to *Gonzalez v. Illinois Pollution Control Board*, 2011 IL App 039021 and *Illinois EPA v. Rawe*, AC 92-5 (Oct 16, 1992) also involve situations where a land owner purchased property with preexisting "open dumping" of waste or litter. In each instance, the landowner was found to have exercised control over the land after their respective purchases and to have failed to remedy the violations. *Gonzalez* at 34; *Rawe* at 6.

The *Shrum*, *Gonzalez* and *Rowe* matters differ substantially from the instant matter in that each of those respondents maintained control of the property at issue while the instant Respondent held no control of the property. The instant matter is more similar to the *Bittle* violation where the Pollution Control Board found the landowner was not responsible for the violations caused by his lessee until such time as the landowner became aware of the violations and allowed them to continue. *Bittle* at 17-19.

Additionally, IEPA notes that Respondent presented no evidence that it took steps to prevent potential violations at the site and did not have a fence at the site to prevent access. IEPA Brief, p. 5. In each of the Pollution Control Board decisions cited by IEPA, *Illinois EPA v. Bettis,* AC 10-21 (February 16, 2012) and *Illinois EPA v. Cadwallader*, AC 03-13 (February 20, 2004), the landowners again maintained control of the property at all times relevant to the alleged violations. The defense raised by both was that the "open dumping" of waste was being done by unknown individuals and trespassers, called "fly dumping." The Pollution Control Board assessed liability against

both landowners on the basis of their control of the property and the fact that each landowner was aware of the "fly dumping" but had taken no steps to restrict access to their property to prevent the improper dumping. *Bettis* at 6; *Cadwallader* at 5-6.

Such situations are extremely different from Respondent's alleged "failure to properly manage its property". IEPA Brief, p. 5. Again, Respondent did not maintain control over its property at the time of the alleged violations – control had been relinquished to its lessee. Respondent has not asserted the defense that it is not responsible for the violations because other, unknown persons engaged in the "open dumping" or "fly dumping" without its permission. The fact that Respondent does not have a fence surrounding the Subject Property is of no moment to this matter as Respondent is not claiming it should not be responsible because trespassers are engaging in "fly dumping" on his property.

Respondent should not be held liable for pollution occurring on the Subject Property during a time it did not control that property as a result of a lease with a third-party. As with the lessor involved in the Pollution Control Board's *Bittle* matter, Respondent should be held liable only for violations continuing after it, as the lessor of the property with no control over the property, was made aware of the violations and failed to take any action to correct the violations. As indicated by IEPA Field Inspector testimony at hearing, when Respondent became aware of the pollution on its property by IEPA, it promptly performed a clean-up of the pollution. Tr. 36:21 – 37:5. Respondent therefore has no liability for the pollution violations and a finding of no liability should be entered on its behalf in this matter.

CONCLUSION

The IEPA has brought forth a cute miniature of an Environmental Protection Act violation – burned materials on a five-foot by six-foot area on a gravel parking lot, with no allegations of hazardous waste being or having been present. Tr. 39:15-20, 38:10-16, 16:12-23. The IEPA Field Inspector found the "open dumping" site to be consistent with materials related to installation of television satellite equipment. Tr. 11:16-21, 15:22 – 16:2. The IEPA Field Inspector was told by a tenant at the Subject Property that the material had been left behind by a satellite installation company which was a previous tenant in the building. IEPA Exhibit 1; Tr 31:3-8. The IEPA has not, however, brought a violation claim against the satellite installation company, but instead the owner of the property leased by it. Why? Because when the IEPA Field Inspector performed her initial inspection, she did not realize the building had two units, "did not notice a sign or anything like that" and only saw the sign for Airgas. Tr. 40:11-24, 43:15-23. When the IEPA Field Inspector was notified by Airgas that there were two units in the building, IEPA apparently took no action to identify the former tenant and instead chose to invoke its own theory of strict liability on Respondent as landowner of the property. Neither the State of Illinois nor the Illinois Pollution Control Board recognize such a strict liability theory on landowners when their property has been leased to a third-party.[7] Instead, both the State and the Pollution Control Board require IEPA to show the landowner had control over either the pollution source or the property

[7] As an aside, it is suggested that the Pollution Control Board refer the actions of the local IEPA Office to the Inspector General regarding cases from February 2006 to the present where it has issued citations based upon its theory of ownership strict liability.

involved at the time the pollution occurred. IEPA has presented no evidence of either and liability should not be assessed against Respondent.

WHEREFORE, Respondent requests the Pollution Control Board enter an order finding no violation of 415 ILCS 5/21(p) by it in regard to the November 4, 2015, Inspection Report issued by the IEPA regarding 1406 Cornell Street, Marion, Williamson County, Illinois.

RONALD E. OSMAN & ASSOCIATES, LTD.

Dated: August 3, 2016 By: Ronald E Osman

Ronald E. Osman
Counsel for James Reichert
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PROOF OF SERVICE

I hereby certify that I did on the 3rd day of August, 2016, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing instrument entitled POST-HEARING BRIEF OF RESPONDENT to:

John Therriault, Clerk
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
P.O. Box 19274
Springfield, IL 62794-9274

Michelle M. Ryan
IL Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794-9276

Ronald E. Osman

Ronald E. Osman & Associates, Ltd.
Attorneys at Law
1602 W. Kimmel/P.O. Box 939
Marion, Illinois 62959

Ronald E. Osman
Blane Osman

Phone (618)997-5151
Facsimile (618)997-4983
Email:rosman@marion.quitamlaw.com

August 3, 2016

VIA CERTIFIED MAIL #7014 2120 0001 1869 5951
RETURN RECEIPT REQUESTED

John Therriault, Clerk
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

Re: IEPA v. James Reichert Limited Family Partnership
AC 16-7 (IEPA No. 344-15-AC)

Dear Mr. Therriault:

Enclosed please find the original and copies of the following items for filing in the above matter:

1) Post-Hearing Brief of Respondent; and

2) Notice of Filing.

Please file the original documents and return a file-stamped copy of each one to our office in the enclosed envelope.

Thank you for your assistance. Please contact our office if you have any questions.

Sincerely,

Becky King
Legal Assistant

/bjk
Enclosures
cc: Michelle M. Ryan
Carol Webb, Hearing Officer