ILLINOIS POLLUTION CONTROL BOARD
March 20, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-118
	)	(Enforcement - Air)
DENNIS FULTS d/b/a ST. CLAIR CONSTRUCTION AND PAVING,	)	
	)	
Respondent.	)	

AMY L. SYMONS, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS.

INTERIM OPINION AND ORDER OF THE BOARD (by K. M. Hennessey):

This case is an enforcement action by the People of the State of Illinois (State) against Dennis Fults d/b/a St. Clair Construction and Paving (Fults). The State alleges that Fults violated the Illinois Environmental Protection Act (415 ILCS 5/1 et seq. (1994)) (Act) and Illinois Pollution Control Board (Board) rules when he demolished a building in Collinsville, Madison County, Illinois. The State claims that Fults caused air pollution in violation of the Act and Board rules by burning demolition debris. The State also claims that Fults violated the Act's and the Board's direct prohibition against open burning. Finally, the State claims that Fults violated the Act by failing to notify the Illinois Environmental Protection Agency (Agency) in writing of his intent to demolish the building, in violation of the Act and the National Emission Standards for Hazardous Air Pollutants (NESHAPs) regulations regarding asbestos. The State seeks a civil penalty of not less than $10,000, an award of its fees and costs and a cease and desist order.

In this opinion and order, the Board finds that Fults committed each of the five violations outlined above. The Board imposes a civil penalty of $10,000 on Fults and orders Fults to cease and desist from further violations of the Act and Board regulations. The Board also orders the State to file an affidavit of its fees and costs, with supporting documentation, with the Clerk of the Board within 30 days. After receiving that affidavit, the Board will enter an order assessing fees and costs.

PROCEDURAL HISTORY

The State filed a complaint against Fults before the Board on December 1, 1995. Fults did not respond. On March 12, 1996, the State filed a request for admission of facts to which

Fults did not respond. Because Fults did not respond, he is deemed to have admitted the facts in the request. (See 35 Ill. Adm. Code 103.162(c).)

On April 18, 1996, the State filed a request for hearing. The hearing was held on May 29, 1996, before Chief Hearing Officer Michael Wallace. Ms. Amy Symons appeared for the State, and Mr. James J. O'Donnell appeared for the Agency. Fults did not appear. The State presented one witness, Ron Robeen (Robeen), who is a field inspector with the Agency's Bureau of Air.

The State filed a post-hearing brief on July 1, 1996, along with a request to supplement the record with certified copies of certain court orders against Fults. These orders involve defendant's misdemeanor conviction on charges of open dumping and open burning in Monroe County and St. Clair County. The Board addresses this motion to supplement on page 8 of this opinion and order.

FINDINGS OF FACT

As noted above, the only witness who testified was Robeen, a field inspector with the Agency's Bureau of Air. (Tr. at 9.)[1] Robeen has a degree in electrical engineering from Southern Illinois University Edwardsville and is certified to conduct asbestos inspections on demolition and renovation sites under the federal Clean Air Act. (Tr. at 9-10.)

On November 28, 1994, Robeen's supervisor asked him to inspect a facility at 401 Belt Line Road in Collinsville, Illinois (site). (Tr. at 13-14.) Robeen visited the site and prepared an inspection report that was admitted into evidence as Exhibit 1 (Exh. 1). (Tr. at 15.)

Fults was at the site during Robeen's visit. Robeen spoke to Fults, who admitted that he was responsible for the demolition of the building; others at the site agreed. (Tr. at 16-17.) Robeen observed several instances of open burning of demolition debris at the site. (Tr. at 22.) The burning debris gave off smoke and an odor, and Robeen opined that these emissions were of a quantity, characteristic or duration to threaten injury to human health, plant life or animal health. (Tr. at 24.) He also stated that the emissions were of a quantity, characteristic or duration so as to threaten an unreasonable interference with enjoyment of life or property. (Tr. at 24.)

Fults told Robeen that Fults had sent a ten-day notification of the demolition to the Agency, as required by the NESHAP regulations regarding asbestos. (Tr. at 17-18.) Robeen later checked with the Agency and determined that no notification had been sent in. (Tr. at 18.)

Robeen admitted that he was not able to inspect the building being demolished at the site to determine if asbestos was present and that he did not know if asbestos was present. (Tr.

[1] The transcript of the hearing is cited as "Tr. at __." The complaint is cited as "Comp. At __."

at 19-20, 27.) One employee at the site told him that asbestos in the building had been removed before the demolition, but Fults told him that there had been no asbestos in the building. (Tr. at 20.) Robeen's inspection report also recounts a conversation Robeen had with Pat Cunningham, an employee of Korman Group, the developer of the site. Cunningham told Robeen that an environmental assessment study was done at the site before the demolition and no asbestos was found. (Exh. 1.) The inspection report also states that the assessment would be sent to the Agency; however, the record does not contain this study.

Robeen also testified to other instances in which Fults had not complied with environmental laws. In particular, Robeen testified that Fults has been convicted of violating county ordinances in Madison and Monroe Counties relating to open dumping and open burning. (Tr. at 28.) In addition, Robeen testified that he observed Fults openly burning demolition debris at a site in Belleville, St. Clair County in 1995. (Tr. at 29-30.) In 1996, Robeen observed Fults burning trees and demolition debris in Swansea, St. Clair County. (Tr. at 31.) At the Swansea site, Robeen informed Fults that open burning was not the proper way to dispose of trees, landscape waste and demolition debris. Robeen testified that Fults replied, "Go ahead and send me another letter. I'll ignore it like the other ones that you sent me." (Tr. at 31.) Robeen issued compliance inquiry letters on the Belleville and Swansea sites. (Tr. at 33.) Robeen concluded that Fults is likely to continue to violate environmental laws "as long as he can make money at it." (Tr. at 31-32.)

DISCUSSION

Count I: Air Pollution

As noted on page 1 of this interim opinion and order, Count I alleges that Fults polluted the air in violation of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141. Section 9(a) provides:

> No person shall:
>
> a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by Board under this Act . . . .

(415 ILCS 5/9(a) (1994).)

Similarly, Section 201.141 of the Board's regulations provides:

> No person shall cause or threaten or allow the discharge of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

(35 Ill. Adm. Code 201.141.)

The Act defines "Air Pollution" as:

> [T]he presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

(415 ILCS 5/3.02 (1994).) A "contaminant" is "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

There is no question that the burning of demolition debris releases contaminants into the air. Robeen confirmed that the burning debris gave off smoke and an odor. (Tr. at 24.) In addition, the uncontested evidence is that the quantity and nature of these emissions was sufficient to threaten injury to human health, plant life or animal health, and to threaten unreasonable interference with the enjoyment of life or property. (Id.) As a result, Fults caused or tended to cause air pollution.

Before finding a violation, however, the Board must consider the factors set forth in Section 33(c) of the Act. Those factors include, but are not limited to:

1. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. The social and economic value of the pollution source;

3. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

4. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. Any subsequent compliance.

(415 ILCS 5/33(c) (1994).) The Board considers these factors in turn.

The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people. As noted, Robeen testified that emissions from the burning demolition debris were of a quantity sufficient to threaten injury to human health, to plant life or animal health, and to threaten unreasonable interference with enjoyment of life or property. The Board weighs this factor against Fults.

The social and economic value of the pollution source. The Board recognizes that a demolition business may have social and economic value. However, Fults presented no specific evidence on the number of persons employed in his business or on the importance of his business in a particular market. (Compare Wells Manufacturing Company v. v. Pollution Control Board, 73 Ill. 2d 226, 235-236, 383 N.E.2d 148, 152 (1978) (pollution source found to have social and economic value when it employed 500 persons and was an important supplier).) The Board weighs this factor in neither side's favor.

The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved. Uncontrolled burning is not suitable in any area, and thus the Board weighs this factor against Fults.

The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source. As Robeen testified, Fults could easily dispose of demolition debris through some other means than burning. (Tr. at 32.) Accordingly, the Board weighs this factor against Fults.

Any subsequent compliance. There is no evidence that Fults complied with the law on November 28, 1994 or thereafter. Accordingly, the Board weighs this factor against Fults.

After considering the Section 33(c) factors, the Board finds that Fults has tended to cause air pollution in violation of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141. The penalty for this violation is set forth after the Board's discussion of Counts II and III.

Count II: Open Burning

Count II alleges that Fults engaged in open burning in violation of Section 9(c) of the Act and Board regulations. Section 9(c) of the Act provides:

> No person shall: . . .
>
> c. Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act . . . .

(415 ILCS 5/9(c) (1994).) "Open burning" is the "combustion of any matter in the open or in an open dump." (415 ILCS 5/3.23 (1994).) "Refuse" means "waste" (415 ILCS 5/3.31 (1994)), and "waste" includes "discarded material." (415 ILCS 5/3.53 (1994).)

Section 237.102(a) of the Board's regulations provides that "[n]o person shall cause or allow open burning, except as provided in this Part." (35 Ill. Adm. Code 237.102(a).) In the Board's regulations, "open burning" is the "combustion of any matter in such a way that the products of the combustion are emitted to the open air without originating in or passing

through equipment for which a permit could be issued under Section 9(b) of the Act ." (35 Ill. Adm. Code 237.101.)

In this case, the demolition debris constitutes "refuse" under the Act, and there is no dispute that Fults burned it in the open. The evidence also shows that smoke and odor were released into the open air without passing through any equipment, permitted or otherwise, when Fults burned the demolition debris. Accordingly, the Board finds that Fults has violated both Section 9(c) of the Act and 35 Ill. Adm. Code 237.102(a) as alleged in Count II.

Count III: NESHAPs Violation

Count III alleges that Fults violated Section 9.1(d)(1) of the Act, which provides:

No person shall:

1. Violate any provisions of Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto . . .

(415 ILCS 5/9.1(d)(1) (1994).)

The State claims that Fults violated 40 CFR 61.145(b)(1) (1995), a regulation adopted pursuant to Section 112 of the Clean Air Act, 42 U.S.C. Section 7412 (1995). Section 61.145(b)(1) provides:

(b) Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall:

(1) Provide the Administrator [of the United States Environmental Protection Agency or USEPA] with written notice of intention to demolish or renovate.

The notice must be provided at least 10 working days before the commencement of demolition. (40 CFR 61.145(b)(3) (1995).) Fults has not contested the Agency's authority to receive notices on behalf of the Administrator of the USEPA. (Comp. at 6-7; Tr. at 27.)

An "owner or operator of a demolition or renovation activity" is:

any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

(40 CFR 61. 141 (1995).)

In this case, Fults was responsible for the demolition and thus was the "operator" of the demolition activity. His demolition activities also fell within the scope of the notification

requirements imposed under 40 CFR 61.145. Section 61.145(a) generally applies to demolition activities as follows:

> To determine which requirements of paragraphs (a), (b) and (c) of this section apply to the owner or operator of a demolition site or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos . . . . The requirements of paragraphs (b) and (c) apply to each owner or operator of a demolition or renovation activity, including the removal of RACM [regulated asbestos-containing material] as follows:
>
> * * *
>
> (2) In a facility being demolished, only the notification requirements of paragraphs (b)(1) . . . of this section apply, if the combined amount of RACM is
>
> * * *
>
> (ii) Less than one cubic centimeter (35 cubic feet) off facility components where the length of the area could not be measured previously *or there is no asbestos*.

(40 CFR 61.145(a) (1995) (emphasis supplied).)

Under this section, a person supervising the demolition of a building that contains no asbestos must still notify the Agency of the demolition. This is also confirmed by statements of the USEPA when it proposed to adopt this requirement:

> [A] proposed amendment clarifies the current requirement that notifications must be made for all demolitions, even when no asbestos is present, in order to promote compliance and aid enforcement.

54 Fed. Reg. 912, 917 (January 10, 1989).

As discussed in the Findings of Fact (*supra* at 2-3), Fults failed to notify the Agency of the demolition. The Board therefore finds that Fults violated Section 9(d)(1) of the Act by failing to comply with 40 CFR 61.145(b).

Penalty

The State has asked that the Board impose a monetary penalty of not more than the statutory maximum, pursuant to Section 42(a) of the Act, which the State claims is not less than $10,000. (Comp. at 4, 5 and 7; State's Br. at 11.) The State also asks that the Board award the State its costs in this matter, including reasonable attorney's fees and expert witness

costs. (Id.) The State has offered to supplement the record with an affidavit of time spent in the prosecution of this case. (State Br. at 11.)

The potential penalty for Fults' violations of the Act and Board regulations may not exceed $50,000 per violation. (See 415 ILCS 5/42(a) (1994).) The Act sets no minimum penalty. Thus, the potential maximum penalty for the five violations that Fults has committed is $250,000.

In determining the appropriate penalty for Fults' violations of the Act and Board regulations, the Board must consider the factors set forth in Section 33(c) (listed above at page 4), as well as the factors set forth in 42(h) of the Act. The Board's earlier discussion of the Section 33(c) factors is incorporated here.

Section 42(h) Factors

Section 42(h) factors are to be considered in aggravation and mitigation of the penalty, and include, but are not limited to, the factors discussed below.

The duration and gravity of the violation. The evidence on the duration of Fults' violations only show that they occurred on one day. However, Fults' violations were serious. Each involved at least the potential for environmental harm and a potential danger to public health.

The presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act. Fults showed no diligence in attempting to comply with the Act or Board regulations or in obtaining relief therefrom. In fact, the evidence shows that Fults intends to keep flouting the law. (Tr. at 31.)

Any economic benefits accrued by the violator because of delay in compliance with requirements. By violating the Act and Board regulations, Fults avoided at least the cost of disposing of refuse at a properly permitted pollution control facility. The exact cost is not in the record, but the record supports a finding that Fults gained some economic benefit through his violations.

The amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act. The State has asked for a total penalty of not less than $10,000 and stated that it believes that this is the penalty that will serve to deter further violations and to enhance voluntary compliance with the Act by others similarly situated.

The number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. As noted in the Procedural History (*supra* at 1-2), the State has moved to supplement the record with evidence that Fults has been convicted of violating county

ordinances banning open burning and open dumping. However, Section 42(h) states that the Board is to consider previous violations of the Act, not local ordinances. While the factors in Section 42(h) are not exclusive, the Board is reluctant to consider violations of local ordinances in setting penalties in the absence of express authorization to do so in the Act. The Board notes that the General Assembly has expressly authorized the Agency and the Board to consider violations of local ordinances in other contexts. (See 415 ILCS 5/39(i) (1994) (Agency may deny certain permits if permit applicant has been convicted of violating certain local laws).) The General Assembly's failure to include such an authorization here suggests that violations of local ordinances should not be considered. The Board therefore denies the State's motion to supplement the record, and will not consider Fults' violations of local ordinances. The State admits that Fults has not been adjudicated to have violated the Act. (State Br. at 10.)

The State also introduced evidence that Fults continued to violate the Act. This factor only allows the Board to consider previously adjudicated violations of the Act. The additional violations the State relies on were not adjudicated, but were the subject of compliance inquiry letters. (Tr. at 33.) The Board is reluctant to consider alleged, rather than adjudicated, violations in the absence of express authorization. Accordingly, the Board does not weigh this factor against Fults.

Considering all of the above factors, the Board finds it appropriate to order Fults to pay a penalty of $10,000. The Board also finds it appropriate to order Fults to cease and desist from further violating the Act and the Board's regulations.

Request for Fees and Costs

The State also has requested its attorneys' fees and costs, which it states will be verified through an affidavit submitted as a supplement to the record at some future time. (State Br. at 11.) The State relies on Section 42(f) of the Act, which provides in relevant part:

> [T]he Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or Attorney General in a case where he has prevailed against a person who has committed a wilful, knowing or repeated violation of the Act.

(415 ILCS 5/42(f) (1994).)

In this case, the State has shown that Fults' violation of the Act were wilful. Accordingly, the Board will award the State its reasonable attorney's fees and costs. However, before the Board will issue an order to Fults to pay those costs, the State must file an affidavit setting forth its fees and costs, along with supporting documentation, to the Clerk of the Board within 30 days of the date of this interim opinion and order. Upon review of those materials, the Board will enter an order assessing fees and costs.

ORDER

1. The Board finds that Fults has violated Section 9(a) of the Act, 415 ILCS 5/9(a) (1994), and 35 Ill. Adm. Code 201.141.

2. The Board finds that Fults has violated Section 9(c) of the Act, 415 ILCS 5/9(c) (1994), and 35 Ill. Adm. Code 237.102(a).

3. The Board finds that Fults has violated Section 9(d)(1) of the Act, 415 ILCS 5/9(d)(1) (1994), by failing to comply with 40 CFR 61.145(b).

4. The Board orders Fults to pay a penalty of $10,000. Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund and shall be sent by First Class mail to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   2200 Churchill Road
   P.O. Box 19276
   Springfield, IL 62794-9276

   The certified check or money order shall clearly indicate on its face Fults' Federal Employer Identification Number and that payment is directed to the Environmental Protection Trust Fund.

   Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

5. The Board orders Fults to cease and desist from further violations of the Act and Board regulations.

6. The Board orders the State to file with the Clerk of the Board an affidavit of its fees and costs in this action and documentation thereof within 30 days of the date of this interim opinion and order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the _____ day of _____, 1997, by a vote of _____.

_____

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board