

ILLINOIS POLLUTION CONTROL BOARD
August 7, 1975

ENVIRONMENTAL PROTECTION AGENCY,)
Complainant,)
)
)
v.) PCB 74-396
)
)
CITY OF PONTIAC,)
Respondent.)

MR. ANTHONY B. CAMERON, Assistant Attorney General, on behalf of
the Complainant.
MR. WILLIAM F. FUHR, on behalf of the Respondent.

OPINION AND ORDER OF THE BOARD (by Dr. Odell)

This enforcement case was filed by the Attorney General on behalf of the Environmental Protection Agency (Agency) on October 29, 1974. The Complaint alleges that Respondent, City of Pontiac (Pontiac), operated a solid waste management site from July 27, 1974, until October 29, 1974, without a permit from the Agency, in violation of Rule 202(b)(1) of the Solid Waste Regulations (Chapter 7) and Section 21(e) of the Environmental Protection Act (Act). On or about December 2, 1974, Pontiac moved to dismiss the Complaint on the grounds that it was exempt from the permit requirement under Section 21(e) of the Act. The Agency filed an Objection to the Motion to Dismiss on December 6, 1974. On December 19, 1974, we ordered that Respondent's Motion to Dismiss would be taken with the case.

A hearing was held in the Pontiac City Hall on February 5, 1975, in which counsel for Respondent renewed the Motion to Dismiss. At the close of the hearing it was stipulated that concluding oral arguments would be waived in favor of briefs. The Agency and Pontiac filed their briefs on April 2 and May 1, 1975, respectively.

HISTORY

The subject of the Complaint is a tract of land, owned by Pontiac, which is located in Section 23, Township 28 North, Range 5 East, Livingston County, Illinois. Pontiac previously operated this tract as a city dump. At the hearing, Mayor Joseph S. Trainor testified that Pontiac stopped using the site in January of 1969, at which time it was closed and posted (R. 79). The Mayor further testified that since that date the site has been used only for the depositing of demolition debris and dirt from buildings and ditches owned by Pontiac (R. 80).

Mr. Ray Sandifer, who resides on city property adjacent to the site, testified that in his capacity as City Works Administrator

he was in charge of the site when it was open as a dump. He confirmed that it ceased operation as a dump on January 6, 1969, and that such cessation was both posted and published in the newspaper (R. 68-69). He explained that since that time Pontiac has deposited thereon "concrete and wreckage" from buildings purchased and demolished by Pontiac, and dirt from city drainage projects (R. 70). He further explained that while he discovered trespassers on the site quite often soon after it was closed, it occurred "very, very seldom . . . hardly at all now" (R. 73).

The Agency presented the testimony of two of its Environmental Specialists who had visited the site in issue. Mr. David Lambert testified that he had visited the site on August 12 and October 24, 1974, and that it was in operation on both of those dates (R. 12, 15). Although the Respondent objected that testimony as to the October 24 visit was irrelevant, since it occurred on the same day the Complaint was mailed and therefore evidence adduced thereon was outside the scope of the Complaint, Mr. Lambert testified that there "was some indication it [the site] had been operating for some time" (R. 17). As a result of the August 12 inspection, the Agency sent to Pontiac a letter stating that it was operating a refuse disposal site without a permit, in apparent violation of the Act and Chapter 7 (R. 17, Comp. Ex. 2). The parties stipulated that during the year previous to the date of the hearing, Pontiac had received at least five written communications (one of which was offered as Comp. Ex. 2, R. 27) from the Agency to the effect that the Agency was of the opinion that Pontiac required a permit for the subject tract of land.

On cross examination Mr. Lambert conceded that his inspection report (Comp. Ex. 1) indicated that the refuse on the site at the time of his August 12 visit included concrete, street sweepings and trees (R. 39). On redirect, however, he added that it was not his practice to detail every component dumped in any given landfill he inspected.

Agency employee John Diefenback testified that he had inspected the site on September 18, 1974, and had found indications that refuse had been accepted "in the past, preceding your [Diefenback's] inspection" (R. 54). His conclusion was based on his observation that some of the refuse -- in particular, cardboard and paper products -- was unweathered, and that some refuse at the site had been deposited in areas where he had not observed any at a previous inspection (R. 55). He does not indicate, however, when his previous inspection occurred. Photographs taken by Mr. Diefenback on his September 18 inspection (admitted into evidence as Comp. Ex. 4) showed, and Mr. Diefenback testified, that the refuse included cardboard products in addition to brush and demolition wastes (R. 53).

ISSUES

Pontiac has raised the defense, both in its Motion to Dismiss and its brief, that it is not required to have a permit under Section 21(e) of the Act since it comes within the exemption created therein. Section 21(e) reads in relevant part:

(No person shall) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activity, without a permit granted by the Agency . . .

If Pontiac properly comes within the scope of this exemption it similarly has a valid defense against Rule 202(b)(1) of the Solid Waste Regulations (Chapter 7) since the 21(e) exemption is expressly incorporated therein. Briefly, Pontiac contends that the demolition waste and dirt from drainage projects disposed of at the site constituted "refuse generated by the operator's own activities".

Refuse is defined in Section 3(k) of the Act as including any discarded solid materials. There can be no question -- nor does Pontiac deny -- that such a broad definition encompasses the kind of waste involved here. We have previously held that building demolition wastes may constitute refuse as defined by the Act. EPA v. Rafacz Landscaping and Sod Farms, Inc., PCB 72-196, 6 PCB 31 (October 24, 1972).

The remaining language of the 21(e) exemption is what the parties quarrel over. "Operator" is not defined in the Act. Pontiac asserts that it should be defined as broadly as in Rule 104(1) of the Solid Waste Regulations, i.e., "a person who owns, leases, or manages a solid waste management facility." Pontiac claims that under such a broad definition it would be an operator and that the disposal of the demolition debris and drainage dirt would be its own activities -- thus within the exemption of Section 21(e). In pressing this argument Pontiac relies on the proprietary aspect of the disposed waste, since it reiterated, both at hearing (R. 70) and in its brief (p. 8), that the buildings demolished were owned by the city and that all material placed on the site was city property.

The Agency, however, points out that the prohibition of Section 21 applies to a "person", while the exemption applies to the activities of an "operator". It argues that if the Legislature had intended the exemption to have the same breadth as the prohibition, it would have used the same word to establish each. Since "person" has an all-encompassing definition in Section 3(j) of the Act, the Agency asserts that "operator" must have a significantly narrower scope. It further argues that "operator" should be defined in the ordinary sense of "a natural person or small group of natural persons who do the physical act of operating the facility in question" (Comp. brief, p. 13).

We need not rule on how "operator" should be defined under the circumstances of this case, because under both definitions proposed by the parties, Pontiac is not entitled to the exemption. We reject Pontiac's contention that mere ownership of the refuse brings it within the scope of the exemption. Section 21(e) and its exemption must be interpreted consistently with the purposes of the Act. Title V, Section 20 states this purpose to be prevention of pollution or misuse of land arising out of improper refuse disposal. To achieve this end the Regulations establish a permit system controlling refuse-disposal activities. The intent of Section 21(e) was to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated. There was no intent to create a gap in the permit system of the magnitude suggested by Pontiac. To interpret the exemption as allowing the municipality to dispose of any refuse it owns without a permit will mean that large quantities of varied materials could be indiscriminately deposited at a waste-disposal site. This obviously circumvents both the permit system and the purposes of the Act.

Pontiac concedes that it in fact deposited the debris at the site. It further stipulated that it did not have an operating permit (R. 7). The Agency witnesses both indicated the site was in operation, with evidence of past operation, at the time of their visits. Photographs clearly show the debris deposited at the site. Having concluded that such debris does not entitle Pontiac to the exemption in Section 21(e), we find this evidence sufficient to make out violations of the Act and Regulations as alleged in the Complaint. As for Pontiac's assertion that it did not feel it needed a permit for this operation, we have previously held that a respondent acts at its own risk when it proceeds on the assumption that no permit is necessary. EPA v. Kaluzny Bros., PCB 72-160, 7 PCB 79, 82 (February 14, 1973).

In addition we find the evidence concerning waste other than demolition debris and drainage dirt sufficient to warrant the conclusion that Pontiac violated Rule 202(b) (1) of the Solid Waste Regulations regardless of the applicability of the exemption by allowing the use of the site without a permit. Mr. Diefenback testified that he observed, and his photographs showed, refuse other than demolition wastes -- specifically cardboard boxes. Although the disposal of such boxes was not actually witnessed, unauthorized dumping occurred. We have consistently held in the past that an owner of a refuse disposal site has a duty to take all reasonable steps necessary to prevent others from using the site illegally. EPA v. Village of Port Byron, PCB 72-67, 6 PCB 9 (October 24, 1972). The testimony indicates that there was no fence at all on the west side of the site and that a single cable on the north side had a gap of two hundred yards through which access could be gained (R. 14).

In evaluating a monetary penalty for the violations set out herein the Board considered the factors included in Section 33(c) of the Act and other facts in this case. The refuse deposited by Pontiac did not include putrescible materials nor create a health hazard. Some mitigation is justified because Respondent is a municipality. Also, the portion of Section 21(e) of the Act that is contested in this case is difficult to interpret. Under these circumstances the Board will not assess a monetary penalty herein, but will require Pontiac to properly close the site or obtain a permit from the Agency if Respondent chooses to continue depositing refuse at the site.


This Opinion constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Respondent, City of Pontiac, shall cease and desist violating Rule 202(b) (1) of Chapter 7 and Section 21(e) of the Act, as found herein, within 90 days of the adoption of this Order.
2. Respondent shall apply final cover within ninety (90) days of the adoption of this Order if it intends to close the site; or apply for within thirty (30) days, and receive within ninety (90) days, an operating permit from the Agency if it intends to continue operating the site.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of August, 1975, by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board