ILLINOIS POLLUTION CONTROL BOARD
April 17, 1997

COUNTY OF LASALLE,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 97-24
	)	(Administrative Citation)
CHARLIE RAIKES, d/b/a KICKAPOO IRON & METAL,	)	
	)	
	)	
Respondent.	)	

ROBERT ESCHBACH APPEARED ON BEHALF OF THE COUNTY OF LASALLE; CHARLIE RAIKES APPEARED *PRO SE*.

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

This matter comes before the Illinois Pollution Control Board (Board) on a petition to review an administrative citation issued by the County of LaSalle (County) under Section 31.1 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/31.1 (1994).

The citation was filed against Charlie Raikes, d/b/a Kickapoo Iron & Metal (Raikes). The citation alleges that Raikes violated Section 21(p)(3) of the Act, 415 ILCS 5/21(p)(3) (1994), by causing or allowing open burning at his facility in Manlius Township, LaSalle County (the site) on August 29, 1996. The statutory penalty for this violation is $500. (See 415 ILCS 5/42(b)(4) (1994).)

For the reasons stated below, the Board finds that Raikes has violated Section 21(p)(3) of the Act and will assess Raikes a penalty of $500. The Board also orders Raikes to pay any hearing costs incurred by the County and the Board, as provided in Section 42(b)(4) of the Act. (See 415 ILCS 5/42(b)(4) (1994).) The Clerk of the Board and the County are ordered to file with the Board a statement of hearing costs, supported by affidavit. After receiving that information, the Board will issue a final order assessing costs and the $500 penalty.

PROCEDURAL HISTORY

The county served Raikes with the administrative citation by certified mail on September 25, 1996. The administrative citation charges Raikes with causing or allowing open burning at the site in violation of Section 21(p)(3) of the Act. That section is enforceable under Section 31.1 of the Act, 415 ILCS 5/31.1 (1994).

Under Section 31.1 of the Act, Raikes had the option of requesting that the Board review the citation, or paying a civil penalty of $500 if he did not wish to contest the citation. Raikes elected to contest the citation and filed a petition for review of the citation with the

Board on October 21, 1996. The Board accepted this matter for hearing on November 7, 1996, and a hearing was held on February 21, 1997.

At the hearing, two witnesses testified for the County: Scott Cofoid (Cofoid), supervisor of field operations for the LaSalle County Department of Environmental Services & Land Use (Department) and Kirsten Duke (Duke), a certified landfill inspector for the Department. Raikes testified on his own behalf. Both parties waived their right to brief this matter.

FACTS

Raikes owns the site, which is located on Route 6, between Marseilles and Seneca in LaSalle County. (Tr. at 5-6.)[1] Cofoid and Duke inspected the site on August 29, 1996 in response to a complaint. (Tr. at 5-7.) Cofoid prepared an inspection report (Report) regarding the inspection that was attached to the administrative citation. Cofoid and Duke arrived at the site at approximately 4:05 p.m. and noticed smoke coming out of the site. (Tr. at 7.) No one was present at the site when Cofoid and Duke arrived. (Tr. at 11.) Cofoid and Duke walked to the back of the site, where they saw some materials burning and photographed them. (Tr. at 8.) The photographs are included in the Report. (Tr. at 8; Report photographs 13, 1, 2 and 3.)

The burning materials included several tires, a golf cart, a motorcycle, scrap metals, some 55-gallon drums and other unidentifiable items. (Tr. at 9, 12.) These materials had been consolidated into a pile. (Tr. at 12.) A small gasoline can sat next to the fire. (Tr. at 12.) Cofoid and Duke also photographed three other areas at the site that contained ashes and burn marks, which Cofoid considered evidence of previous burns at the site. (Tr. at 9-10.) The Report notes evidence of many other burn piles in addition to those photographed. (Report at 5; Tr. at 13.) Cofoid observed miscellaneous scrap scattered throughout the site. (Report at 5; Tr. at 13-14.)

Cofoid testified that Raikes then arrived at the site and told Cofoid and Duke that he was the operator of the site. (Tr. at 11.) Raikes also told them that he was unaware of the fire and that his grandson may have started the fire while cutting metals at the site. (Tr. at 11.) Duke confirmed Cofoid s testimony in all respects. (Tr. at 15-17.)

Raikes testified that Kickapoo Iron & Metal had operated at the site for approximately 30 years, and that no one had ever told him about a pollution control ordinance on open burning. (Tr. at 18.) He testified generally about the operation of the business and his efforts to keep the environment clean. (Tr. at 18-19, 22-26.) He testified that the site was not a dump but a scrap metal yard, and that everything on the site was valuable. (Tr. at 19.) Raikes admitted, however, that people dump stoves, tires and other materials at his property at night. (Tr. at 23.) Raikes said that he has complained about the dumping to the sheriff s department, but nothing has ever been done about it. (Tr. at 23.) Raikes also stated that he

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[1] The transcript of the hearing is cited as Tr. __. The complaint is cited as Comp. __, and the report attached to the complaint as Report __.

receives tires at the site, which are attached to vehicles he receives, such as motorcycles and golf carts. (Tr. at 33.) He eventually takes these tires to a tire shredder. (Tr. at 33.) He testified that the tires were not at the site very long, but admitted that we do end up with quite a few tires. (*Id*.) The record does not disclose whether the site is fenced.

Raikes testified that the fire on August 29, 1996 was an accident. (Tr. at 21, 25.) He explained that his grandson was cutting metal and some weeds must have caught fire and spread to the pile of material that Cofoid and Duke saw burning. (Tr. at 21.) Raikes said his son eventually put the fire out with a fire extinguisher. (Tr. at 21.) He testified that he had already sold the motorcycle and golf cart to someone in Streator for $275 and had to refund the money after the fire. (Tr. at 20, 21.)

DISCUSSION

Section 21(p)(3) violation

The administrative citation charges Raikes with causing or allowing open burning at the site in violation of Section 21(p)(3) of the Act. That section provides:

> No person shall:
>
> * * *
>
> (p) in violation of subdivision (a) this Section, cause or allow the open dumping of waste in a manner which results in any of the following occurrences at the dump site:
>
> * * *
>
> 3. open burning.

(415 ILCS 5/21(p)(3) (1994).) Subsection (a) of Section 21, to which Section 21(p)(3) refers, provides:

> No person shall:
>
> (a) Cause or allow the open dumping of any waste.

(415 ILCS 5/21(a) (1994).)

Open dumping means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. (414 ILCS 5/3.24 (1994).) Refuse means waste, (415 ILCS 5/3/32 (1994)) and waste includes any garbage . . . or other discarded material. (415 ILCS 5/3.53 (1994).) Open burning is the combustion of any matter in the open or in an open dump. (415 ILCS 5/3.23 (1994).)

Section 21(p)(3) requires the County to show, as a threshold matter, that Raikes has caused or allowed open dumping. Raikes initially argues that his site is not an open dump

and that therefore he has not violated Section 21(p)(3). Essentially, Raikes argues that much of the material on his site is scrap metal that has value. However, Raikes admitted that others dump discarded materials on his property (Tr. at 23) and that he receives tires at the site that he eventually takes to a tire shredder. (Tr. at 23, 33.) The record also shows that miscellaneous scrap is scattered throughout the site in a manner that suggests that much of it has been discarded. (Report at 5.) These materials constitute waste.

That others dumped some of the waste at the site is no defense. The Illinois Supreme Court has established that one may cause or allow a violation without knowledge or intent. In People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), the Illinois Attorney General alleged that the Fiorinis, as owners and operators of a dump site, had caused or allowed the open dumping of waste and violated other laws. In discussing the open dumping allegation, the court noted that knowledge or intent is not an element to be proved for a violation of the Act. Th[is] interpretation of the Act . . . is the established rule in Illinois. (Fiorini, 143 Ill. 2d at 336, 574 N.E.2d at 618.) (See also Freeman Coal Mining v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974) (finding that owner of land with a mine refuse pile had caused or allowed water pollution when runoff from the pile discharged into a stream: that the discharges were accidental and not intentional, or that they occurred in spite of petitioners efforts to prevent them, is not a defense.); IEPA v. Gordon (February 7, 1991), AC 89-156, 118 PCB 309, 312 (The owner of the property that creates the pollution has a duty, imposed by the legislation, to take all prudent measures to prevent the pollution.))[1]

While knowledge or intent need not be shown, liability requires that the respondent be shown to have had control over the source of pollution. (See Fiorini, 143 Ill. 2d at 346, 574 N.E.2d at 623 (The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.) In Phillips Petroleum Company v. IEPA, 72 Ill. App. 3d 217, 390 N.E.2d 620 (2d Dist. 1979), for example, the court found that Phillips Petroleum Company (Phillips) had not caused or allowed air pollution when anhydrous ammonia escaped from a tank car owned by Phillips. The tank car was part of a train operated by the Chicago and Northwestern Transportation Company and the ammonia escaped when the train derailed while en route from Illinois to Wisconsin. The court acknowledged that other cases had ruled that knowledge or intent need not be shown, but noted that in such cases,

> 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

[1] The Fiorini court did not cite several cases in which courts suggested that knowledge or intent must be shown to impose liability for "causing or allowing" pollution. (See, *e.g.*, McIntyre v. PCB, 8 Ill. App. 3d 1026, 1029, 291 N.E.2d 253, 256 (3d Dist. 1972) and Wasteland, Inc. v. PCB. 118 Ill. App. 3d 1041, 1052, 456 N.E.2d 964, 974 (3d Dist. 1983).) To the extent that these cases are inconsistent with Fiorini, however, Fiorini is the controlling precedent. Fiorini is more recent than McIntyre and Wasteland and is also the decision of the State s highest court.

> show any admissible evidence which indicates that Phillips exercised sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution.

(Phillips Petroleum, 72 Ill. App. 3d at 220-221, 390 N.E.2d at 623.) Fiorini cited Phillips Petroleum with approval. (Fiorini, 143 Ill. 2d at 346, 574 N.E.2d at 623; see also People v. A. J. Davinroy Contractors, 249 Ill. App. 3d 788, 795-796, 618 N.E.2d 1282, 1287-1288 (5th Dist. 1993) (contractor s capacity to control sufficient to impose liability for causing or allowing water pollution when sewage flowed into a ditch in connection with contractor s construction project).)

Here, there is no dispute that Raikes, as operator of the site, had the ability to control the site. He also has admitted that others have dumped waste at the site and that he has received waste at the site, and there was other evidence of waste at the site. In similar situations, the Board has found open dumping. (See, *e.g.*, County of Jackson v. Easton (December 19, 1996), AC 96-58, slip op. 2, 4 (presence of tires, metal materials and wiring and household goods on the ground at site supported finding of open dumping); Gordon, 118 PCB at 311 (presence of burnt tires and piles of debris supported finding of open dumping).) The Board finds that Raikes caused or allowed open dumping of waste at the site.

The Board also finds that the open dumping of waste occurred in a manner that resulted in open burning at the site on August 29, 1996. Cofoid and Duke saw materials burning in the open during their inspection, and that constitutes open burning. For several reasons, the Board also finds that this open burning occurred as a result of the manner in which waste was openly dumped at the site. First, the condition in which waste was scattered or piled up around the site facilitated the open burning. Second, Raikes claims that the fire may have started accidentally when his grandson used a cutting torch near a pile of materials and a gasoline can, but these claims also demonstrate that the open burning resulted from the manner in which waste was dumped at the site. Third, the evidence of previous fires at the site also suggests that the fire on August 29, 1996 was not an isolated incident, and that Raikes had notice that open burning could occur at the site. The Board also finds that some of the materials burned had value is not relevant; Section 21(p)(3) applies to all instances of open burning that occur as a result of open dumping, regardless of the value of the materials burned. For these reasons, the Board finds that Raikes has violated Section 21(p)(3) of the Act.

In an administrative citation, the Board also must determine that the violation did not result from uncontrollable circumstances. (See 415 ILCS 5/31.1 (1994).) The conditions in which the open burning occurred are Raikes' responsibility and the Board cannot find that the fire resulted from factors beyond Raikes' control.

Penalty and Costs

Section 42(b)(4) of the Act provides for penalties in an administrative citation action as follows:

> In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (o) or (p) of Section 21 of the Act shall pay a civil penalty of $500 for each violation of each such provision, plus any hearing costs by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Fund, to be used in accordance with the provisions of the Environmental Protection Fund Act except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government.

(415 ILCS 5/42(b)(4) (1994).)

The Board will assess Raikes the statutory penalty of $500. The Board and the County also are entitled to their hearing costs under Section 42(b)(4) of the Act, but no information on those costs is included in the record. Therefore, the Clerk of the Board and the County are ordered to file with the Board a statement of costs, supported by affidavit, and to serve the affidavit upon Raikes.

This interim opinion constitutes the Board's interim findings of fact and conclusions of law in this case.

ORDER

1. Respondent Charlie Raikes, d/b/a Kickapoo Iron & Metal (Raikes) is found to have violated Section 21(p)(3) of the Act, 415 ILCS 5/21(p)(3) (1994), on August 29, 1996.

2. The County of LaSalle shall file a statement of its hearing costs, supported by affidavit, with the Board and with service on Raikes, within 14 days of this order. Within the same 14 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service on Raikes.

3. Raikes is given leave to file a reply to the filings ordered in paragraph 2 of this order within 14 days of receipt of that information, but in no event later than 40 days after the date of this order.

4. No earlier than 40 days after the date of this order, the Board will issue a final order assessing a statutory penalty of $500 and awarding appropriate costs.

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