

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF WINNEBAGO )

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

ENVIRONMENTAL PROTECTION AGENCY, )  
 ) NO: PCB 70-2  
v. )  
 )  
J. M. COOLING )

OPINION OF THE BOARD (BY MR. LAWTON):

Complaint was filed by the Environmental Protection Agency against J. M. Cooling, Respondent, alleging that during the month of July, 1970, Respondent permitted the open burning of refuse on his property, in violation of the Rules and Regulations governing the control of air pollution, effective under Section 49c of the Environmental Protection Act. Initial Hearing on the foregoing Complaint was held in Rockford on September 23, 1970 at the City Hall. At the opening of the Hearing, the Environmental Protection Agency moved to be allowed to file an Amended Complaint alleging that during the period from approximately June 13, 1970 to July 27, 1970, Respondent "caused, allowed and permitted the open burning of refuse" in violation of Section 9(c) of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution, and Rule 3.05 of the Rules and Regulations for Refuse Disposal Sites and Facilities, and that during the period from approximately June 13, 1970 to September 16, 1970, Respondent caused and allowed the open dumping of refuse in violation of Section 21(b) of the Act, and Rules 3.04, 5.06 and 5.07 of the Refuse Disposal Regulations, operated a refuse disposal site or facility in violation of Rules 5.03, 5.05, 5.06 and 5.07 of the Refuse Disposal Regulations, and caused or allowed the discharge of contaminants so as to cause water pollution by disposing of refuse in standing water, in violation of Section 12(a) of the Act, and Rule 5.12(c) of the Refuse Disposal Regulations.

All of the foregoing regulations remain in effect pursuant to Section 49c of the Act.

The Environmental Protection Agency asked that an Order be entered directing the Respondent to cease and desist the open burning of refuse, the open dumping of refuse, the operation of a refuse disposal site and facility in violation of the rules and regulations,

and the disposal of refuse in standing water, and that a \$10,000.00 fine be assessed for each violation, plus \$1,000.00 for each day such violation shall be shown to have continued.

Respondent's objection to the filing of the Amended Complaint was overruled and the Amended Complaint was filed. Respondent next made a series of motions, the first of which prayed that the Amended Complaint be stricken and the cause dismissed on the grounds that the Environmental Protection Act and the Regulations were unconstitutional because of vagueness and did not inform Respondent as to what activities constituted a violation, and that Respondent was thereby denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The motion was denied by the Hearing Officer. We sustain this Ruling. The applicable sections of the statute and regulations leave no doubt as to the activities and violations with which Respondent is charged. Section 9(c) of the Act expressly prohibits the causing or allowing of the open burning of refuse and the conduct of a salvage operation by open burning. Section 3(g) defines open burning as the combustion of any matter in the open or in an open dump. Section 3(k) defines refuse as any garbage or other discarded solid materials. Section 2-1.1 of the Rules and Regulations governing the control of air pollution, which remain in force and effect pursuant to Section 49(c) of the Act, expressly provides that no person shall conduct a salvage operation by open burning. Section 2-1.2 provides that no person shall cause, suffer, permit or allow open burning of refuse. Salvage operation is defined as any business, trade or industry engaged, in whole or in part, in salvaging or reclaiming any product or material such as, but not limited to, metals, chemicals, shipping containers or drums. Open burning is defined as any burning of combustible materials, wherein the products of combustion are emitted directly into the open air without passing through a stack or chimney. Rule 3.05 of the Rules and Regulations for Refuse Disposal Sites and Facilities expressly prohibits open burning.

From the foregoing, it is manifest that the allegations set forth in paragraph 1 of the Amended Complaint are precise and detailed and not subject to a characterization of vagueness. The same will be noted with regard to the statutory and regulatory provisions set forth in paragraphs 2, 3 and 4 of the Complaint. Section 21(b) of the Act provides that no person shall cause or allow the open dumping of any refuse in violation of regulations adopted by the Board. Rule 3.04 of the Rules and Regulations for Refuse Disposal Sites and Facilities prohibit open dumping. Open dumping is defined under the Act, Section 3(h) to mean the consolidation of refuse from one or more sources in a central disposal site that does not fulfill the requirements of a sanitary landfill. Sections 5.06 and 5.07 of the foregoing Rules go into substantial detail in providing what is required for spreading and compacting

of refuse and how cover shall be applied. Rule 5.06 requires spreading and compacting in shallow layers of approximately two to three feet in depth to be done on a daily basis. Rule 5.07 requires cover to prevent fly and rodent breeding, release of odors and the elimination of fire hazards. The depth and character of cover on a daily and final basis are set forth. Rule 5.03 requires that the dumping of refuse be confined to the smallest practical area. Rule 5.05 requires that sufficient equipment in operational condition be available at the site at all times to permit operation of the landfill according to an approved plan. Rule 5.12(c) expressly prohibits the deposition of refuse in standing water.

Statutory and regulatory provisions, far less detailed than the foregoing, were held to withstand the challenge of vagueness in the case of Department of Health v. Owens Corning Fiberglass Corporation, 242 A. 2d 21 (1968), affirmed 250 A. 2d 11 (1969), where the Defendant was found guilty of violating a regulation enacted pursuant to a New Jersey statute which merely prohibited the causing, suffering, allowing or permitting the emission into the outdoor air of substances in quantities resulting in "air pollution". Air pollution was defined under the statute as the "presence in the outdoor atmosphere of substances in quantities which are injurious to plant or animal life or to property or unreasonably interfere with the comfort and enjoyment of life and property within the state..."

The New Jersey statute and regulations, in effect, adopted a general nuisance approach without the specification found in the Illinois Act and regulations, which not only detail what is prohibited, but likewise specify what must be done affirmatively in the operation of facilities such as conducted by Respondent.

Respondent's remaining motions were as follows:

1. That a continuance be granted on the grounds that Respondent's attorney had been retained only two days before the Hearing. This motion was denied. Respondent's unexplained and unexcused delay in looking after his own interests cannot slow down the Board's processes in performing its statutory duties. Continuances in this matter would seriously inconvenience the Board's Hearing program and lead to further delay in correcting the conditions complained of.

2. That the original Complaint be stricken. This motion was mooted by the allowance of the filing of the Amended Complaint.

3. That the Agency's Motion to file the Amended Complaint be denied or, that in the alternative, the Agency amend its Complaint to comply with Section 31, Chapter 111-1/2 of the Illinois Revised Statutes and that a minimum of twenty-one days' notice be given Respondent of the Amended Complaint. The motion to deny the Agency leave to file the Amended Complaint was denied.

The Hearing Officer ruled that the Hearing would proceed instanter on Count 1 of the Amended Complaint which was substantially the same as the sole count of the original Complaint and that Hearing on Counts 2, 3 and 4 of the Amended Complaint would proceed on October 12, 1970, which date was twenty-one days from the date that the Amended Complaint had been served upon Respondent (R6). This procedure was agreed to by the parties.

At the close of the Hearing on September 23, the Agency moved that Counts 2 and 3 be amended by providing that the initial date for the beginning of the alleged offenses set forth in those counts be changed in each instance from June 13, 1970 to August 5, 1968. (R219) This Amendment was allowed. At the close of the second Hearing, the Agency moved to amend Counts 2, 3 and 4 to allege violations continuing to October 12, 1970. This motion was allowed.

We sustain all rulings of the Hearing Officer.

Respondent's answer denying each allegation of the Complaint was filed and permitted to stand as an answer denying each allegation as amended.

Hearings were held on September 23, 1970 and October 12, 1970. At the close of the October 12 Hearing, the case was taken under advisement with each side given leave to file simultaneous briefs.

During the course of the hearing (P13, 325) and in his brief, Respondent raises the question of whether the statute and the regulations remaining in effect as a consequence of the statute, may relate to violations and result in orders and penalties for offenses occurring prior to the effective date of the statute, being July 1, 1970. There is no question that the Environmental Protection Act, by its express terms, gives jurisdiction to the Board to hear matters pre-dating the effective date of the Act and keeps in force and effect all regulations previously promulgated by the Air Pollution Control Board, the State Sanitary Water Board and the Department of Public Health relative to the control and abatement of air pollution, water pollution and improper disposal of solid waste until repealed or superseded. Section 49(b)(c). All regulations relating to open burning and refuse disposal sites, the violation of which Respondent is charged with, were in effect on the dates of the alleged offenses and have remained in effect to date.

Paragraph 240.1 through 240.17 of Chapter 111-1/2, Illinois Revised Statutes being the Air Pollution Control Act now repealed, but in effect at all relevant times before July 1, 1970, vested in the Air Pollution Control Board power to promulgate rules and regulations to abate air pollution. Section 240.15 provided for a penalty not to exceed \$5,000.00 for any violation of the Act or determination of the Board and additional penalty not to exceed \$200.00 for each day the violation continued.

Chapter 111-1/2, Paragraph 471, now repealed but also in effect at all relevant times before July 1, 1970, vested in the Department of Public Health, the power to supervise the operation and maintenance of refuse disposal sites and facilities and to promulgate rules and regulations to this end. Section 473.1 provides that whoever violates any provision of this Act shall be fined not more than \$100.00 for each offense. Each day's violation constitutes a separate offense. The Department had power to adopt such rules as it "considers necessary from time to time to carry out this Act." A violation of the Rules would constitute a violation of the Act.

From the foregoing statutory provisions and regulations promulgated thereunder, it will be seen that the violations with which Respondent has been charged were violations of the law prior to the effective date of the new Environmental Protection Act and that the new Act keeps in force and effect all regulations previously promulgated by the Air Pollution Control Board, relative to air pollution and rules and regulations promulgated by the Department of Public Health, relative to refuse disposal sites. Any fines imposed for events pre-dating the new Act but constituting violations under the old statutory provisions cannot be deemed retroactive or ex post facto, since the fines imposed are within the statutory monetary limits as in each case provided. Both the offenses and the fines relating thereto were cognizable under prior law and the regulations promulgated thereunder were in force at all relevant times and are presently.

We have reviewed the entire testimony and evidence in the case, together with the briefs submitted by both parties. We have carefully considered all legal arguments raised by both parties and have reviewed the relevant constitutional, statutory and regulatory provisions.

It is the Order of the Pollution Control Board that an Order be entered against J. M. Cooling directing him to cease and desist the open burning of refuse in violation of Section 9c of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations governing the control of air pollution, and Rule 3.05 of the Rules and Regulations for refuse disposal sites and facilities and that J. M. Cooling likewise be ordered to cease and desist the open dumping of refuse and the operation of a refuse disposal site, in violation of Section 21b of the Act and Rules 3.04, 5.06 and 5.07 of the Rules and Regulations for refuse disposal sites and facilities.

The Board finds the evidence is insufficient to establish that J. M. Cooling has violated Rules 5.03 and 5.05 of the Rules and Regulations for Refuse Disposal Sites and Facilities relative to the size of the dumping area and the availability of equipment, respectively, and that the evidence is insufficient to establish that J. M. Cooling has violated Section 12a of the Act and Rule 5.12c of the Refuse Disposal Regulations by causing water pollution by disposing of refuse in standing water.

It is the further order of the Pollution Control Board that a fine of \$1,000.00 be assessed against J. M. Cooling, of which \$500.00 is assessed for causing, allowing and permitting the open burning of refuse, in violation of Section 9c of the Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations governing the control of air pollution, and of which \$500.00 is assessed for causing and allowing the open dumping of refuse in violation of Section 21b of the Act and Rules 3.04, 5.06 and 5.07 of the Rules and Regulations for refuse disposal sites and facilities and for the operation of a refuse disposal site or facility in violation of Rules 5.06 and 5.07 of the Rules and Regulations for Refuse Disposal Sites and Facilities.

The facts of the case are not substantially in dispute. Joseph M. Cooling owns a fifty-acre tract in the unincorporated area of Winnebago County near the City of Rockford. Located on his property is an abandoned quarry of irregular shape covering approximately three acres which has a depth of approximately forty feet (R32). According to the Respondent, the pit or quarry had been used as a dump site for the last twenty years, but operated by the Respondent for only the last six or seven years (R34). The evidence indicates that the pit had been used for the dumping or burning of diseased Dutch elm trees, the dumping of landscape refuse and the deposit of demolished structures. While the evidence does not clearly indicate any calculated effort to receive garbage and comparable refuse, the evidence does indicate that, on occasion, such refuse was dumped in the site, together with empty cans and metal appliances and debris (See EPA Exhibits 3 A, B and C, 4, 5 and 6, 8 A and B and 9 A and B) and left in an uncovered condition.

The Respondent grows sod on the site and also had done some landscaping work which has generated refuse of this character, likewise deposited in the pit. Efforts made to compact and cover the deposited refuse appear to have been casual, at best, although Respondent does possess equipment suitable to achieve this result.

On May 3, 1967, Respondent received a letter from the Winnebago Department of Public Health authorizing operation of a refuse disposal site for the burning of trees and wood products, but not permitting the dumping of garbage and burning of tires. On April 13, 1970, Respondent paid the Winnebago Department of Public Health, a \$25.00 fee to enable operation of a sanitary landfill. No state license to permit landfill operation was introduced in evidence.

On or about June 20, 1970, a fire of undetermined origin ignited the refuse in the pit which continued burning for approximately five weeks before it was completely extinguished. Respondent and his sons made some initial efforts to extinguish the fire and, on

June 27 the Fire Department of the Northwest Fire Protection District was called. From the testimony of the chief and various members of the department, it appears that approximately twenty-eight members were present on a single day (R155) and succeeded in extinguishing a substantial part of the fire. No fire-fighting activities by the Department took place subsequent to June 27, although the chief occasionally visited the site and inspected the status of the fire.

It appears that after that date, the fire again spread and some limited effort was made by the Cooling family to wet down the fire through sprinkling devices and irrigation nozzles and through the use of earth-moving equipment to break up the ignited areas (Testimony of Phillip Cooling R280-311).

Various witnesses testified to the smoke generated by the fire, the substance of which testimony indicated that adjacent owners of property were subjected to smoke and odors for a substantial period of time extending from approximately June 20 to July 27.

Cecil Broughton (R11) testified that he observed the fire almost every day during the period of its burning, that flames were observed particularly at night, and that smoke entered his home between 40% and 50% of the time that the fire was in progress. (R18).

George F. Reid (R25) testified that he lived approximately one-half mile west of the pit and observed the fire and flames during the entire period involved. He likewise was subjected to the odors and smoke. He described the odor as that of decomposed material and definitely not that of burning trees.

Otto Klein, an employee of the Environmental Protection Agency, testified to the character of emissions resulting from the burning of landscape refuse (R132-139). Specifically, he testified to the emissions of carbon monoxide, formaldehyde, organic acids, hydrocarbons, oxides of nitrogen and particulate matter.

Charles E. Clark, Chief of the Bureau of Land Pollution Control, testified to the nature of the refuse found in the dump subsequent to the fire and took pictures that were introduced as EPA Exhibits 4, 5 and 6. His testimony indicated the presence of uncovered refuse over a portion of the site measuring approximately 200'x50' in area and that while perhaps 25% to 30% of the dump site was covered, even this portion was not satisfactory under the law. (R335). Refuse was noted in water but the source of the water was not evident.

Andrew A. Vollmer (R338) testified that he was a photographer for the Environmental Protection Agency and identified Exhibits

3a, b and c, 7a and b and 9a and b, as having been taken by him at the the dump site. Reference to these exhibits likewise shows uncovered dumping and exposed salvage material. These pictures were taken in September of 1970.

Gary C. Brashear (R346-358) testified that he was an inspector employed by the Environmental Protection Agency in the Bureau of Land Pollution and that on August 5, 1968, he visited the dump site and noted the open dumping of demolition material which, in his opinion, was not properly compacted or covered (R348). Noted also were paper, pasteboard, roofing, lumber, tree scraps and wood chips and that approximately 30% of the dump site was uncovered and 50% to 60% was not properly compacted. This witness visited the dump site again on October 22, 1968 and noted the same condition. The same condition was noted on his visit of November 27, 1968 and on February 25, 1969, on which occasion approximately 60% or 65% of the pit was uncovered and 75% or 80% was not properly compacted. He also observed refuse dumped in the water on the north edge of the pit. The witness also inspected the site on June 10, 1969, at which time he observed some improvement in the spreading and compacting and the applying of proper cover. However, during his visit of September 29, 1969, the witness observed that the refuse was again being dumped without spread or compaction and was not properly covered. The same condition was observed on January 30, 1970 by the witness, on March 26, 1970 and again subsequent to the fire on September 15 and September 16, 1970.

Leonard Lindstrom (R375-395) testified that he was an employee of the Environmental Protection Agency and that he visited the landfill on October 6 and October 7 of 1970: On October 7, a trench was dug through the refuse and pictures taken were introduced as EPA Exhibit 10. The trench dug varied in height from three feet to eleven feet and disclosed the character of the material comprising the refuse in the dump (R382). According to the witness, approximately 25% was wood, trees, branches and boards. Approximately 3% was woodwork or concrete. Approximately 30% was dirt. The remainder was wire and sheet metal and a small percentage was bottles, cans and cardboard. Also found were solid brick and concrete. Odor emanated from the trench and the water found therein. A leachate effect had resulted from the decomposition of the material in the pit. The source of the water was not clearly indicated and it is reasonable to assume that it could emanate from an underground spring, rain or the residue of water used in the effort to extinguish the fire, or a combination of these sources.

EPA witness George M. Hughes did not indicate that a nearby well had been polluted as a consequence of the dumping operation.



The Respondent's testimony was primarily directed to his efforts to extinguish the fire, both before and after the Fire Department had made its efforts. Phillip Cooling, son of the Respondent, testified that during the early days of the fire, he operated a caterpillar tractor in an effort to extinguish it. On the first day, the witness, his four brothers and his father all participated. According to the witness, efforts were made to cover the fire, then to flood it, and later to cut channels through it. However, the wind caused further igniting and their efforts were of little avail. In the opinion of the witness, the source of the fire was spontaneous combustion. As a result of the fire department's activity, approximately 90% of the fire was extinguished. Subsequently, further efforts were made to extinguish the fire by continued gouging and flooding. These activities continued every day until the middle of July when the fire was ultimately burned out. A nearby pond was used as a source of water and refilled by pumping. This was depleted and refilled approximately twelve or fifteen times (R291). After the Fire Department left, he used the caterpillar tractor "about every day" for approximately three or four hours gouging and trying to put out the fire. However, the point was reached where the fire became too intense to continue this activity. A good deal of the fire was left burning and portions not ignited were watered down to lessen the chance of further spread of the fire. Phillip Cooling also testified that some degree of compacting and covering was done when refuse was brought into the pit, but that it was not done on a daily basis (R220).

Three conclusions emerge from the testimony of the parties:

1. That Respondent's operation of the landfill was not in keeping with the applicable statutory and regulatory provisions relating to the operation of refuse disposal sites and facilities. (Section 21(b) of the Act and Rules 3.04, 5.06 and 5.07 of Rules and Regulations for Refuse Disposal Sites and Facilities).
2. That the failure to cover and compact the refuse as required by Rules 5.06 and 5.07 of the refuse disposal rules and leaving the refuse in a generally unsatisfactory condition, coupled with the negligent and slipshod operation of the dump, created a condition which made fire more probable and enabled the fire to spread in a manner making it impossible to extinguish.
3. That Respondent's efforts to extinguish the fire were minimal, at best, and that in consequence of the foregoing, it is proper to find that Respondent caused, allowed and permitted the open burning of refuse, in violation of Section 9c of the Statute and Rules 2-1.1 and 2-1.2 of the Rules and Regulations governing the control of air pollution.

We believe that the Agency has established its burden in proving that Respondent caused and allowed the open dumping of refuse and operated a refuse disposal site in violation of the relevant provisions and regulations from August 5, 1968 to the date of the fire, being June 20, 1970. Because of his negligence in the operation of the dump site, the Respondent caused, allowed and permitted the open burning of refuse in violation of the relevant statutory and regulatory provisions. The Agency's burden of proof has likewise been established in this respect. The law does not require that in order to be found guilty of the open burning provisions, the Respondent must actually be seen igniting the materials burned. Negligence, indifference and slipshod operation of a facility having a high potential of combustion falls within the purview of the statute and regulations. The \$1,000.00 penalty is well within the applicable provisions.

In arriving at this Order, we have considered the character and degree of injury to the health, general welfare and physical property of the people, the social and economic value of the pollution source and its suitability in the area in which it is located, together with the technical practicality and economic reasonableness of eliminating the emissions charged. Respondent's operation of his dump in the manner complained of served no valid economic or social objectives. On the contrary, the health and property of adjacent owners were placed in severe jeopardy. Proper operation and management could have avoided this result without imposing any economic burden or hardship upon Respondent.


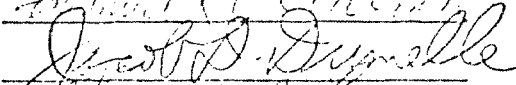
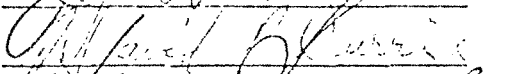
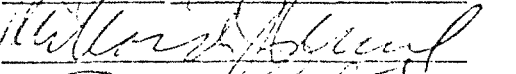
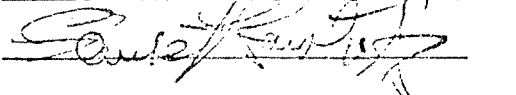
It is clear from the total evidence that Respondent permitted and created a condition that enabled the conflagration of the entire dump site under circumstances precluding its extinguishment. The averting of a major holocaust was not because of Respondent's efforts. What was done by Respondent and his family to abate the fire was too little and too late to serve as a defense for the violations charged.

The Pollution Control Board finds that:

1. It has jurisdiction of the subject matter of this proceeding and the parties hereto;
2. Proper notice of the complaint and hearing thereon was given to Respondent and Hearing thereon held as by statute in such cases made and provided;
3. J. M. Cooling caused, allowed and permitted the open burning of refuse in violation of the Environmental Protection Act and the Rules and Regulations governing the control of air pollution and caused and allowed the open dumping of refuse and operated a refuse disposal site in violation of the Environmental Protection Act and the Rules and Regulations for refuse disposal sites and facilities.

IT IS THE ORDER of the Pollution Control Board that J. M. Cooling cease and desist the open burning of refuse, in violation of Section 9c of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations governing the control of air pollution and Rule 3.05 of the Rules and Regulations for Refuse Disposal Sites and Facilities, and that J. M. Cooling cease and desist the open dumping of refuse and the operation of a refuse disposal site, in violation of Section 21b of the Environmental Protection Act and Rules 3.04, 5.06 and 5.07 of the Rules and Regulations for Refuse Disposal Sites and Facilities. Penalty in the amount of \$1,000.00 is hereby assessed against J. M. Cooling of which \$500.00 is assessed for causing, allowing and permitting the open burning of refuse, in violation of Section 9c of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations governing the control of air pollution and Rule 3.05 of the Rules and Regulations for Refuse Disposal Sites and Facilities, and of which \$500.00 is assessed for causing and allowing the open dumping of refuse and operating a refuse disposal site, in violation of Section 21b of the Environmental Protection Act and Rules 3.04, 5.06 and 5.07 of the Rules and Regulations of Refuse Disposal Sites and Facilities.

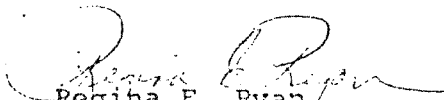
I concur:

I dissent:

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I, Regina E. Ryan, certify that the Board has approved the above Opinion this 12 day of December 1970.

  
Regina E. Ryan  
Clerk of the Board