

ILLINOIS POLLUTION CONTROL BOARD
December 6, 1989

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 88-93, Docket A and B
)	(Administrative Citation)
)	EPA Case No. 9264-AC
CITY OF HERRIN,)	
)	
Respondent.)	

WILLIAM SELTZER APPEARED ON BEHALF OF COMPLAINANT.

KENNETH BLEYER APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon a November 15, 1988 filing of an Administrative Citation by the Illinois Environmental Protection Agency (Agency) and a December 20, 1988 filing of a Petition for Review filed by the City of Herrin (Herrin).

A hearing was held on April 24, 1989 in Marion. No members of the public were in attendance.

On October 18, 1989, Herrin was granted an extension for filing its brief until November 1, 1989. Herrin's brief was not filed. Herrin requested that the deadline for filing its closing argument be extended to December 1, 1989. On November 9, 1989 Herrin requested that the deadline for filing its closing argument be extended to December 1, 1989. On November 15, 1989 the Board issued an order denying Herrin's motion for extension. The Board will decide this case on the hearing transcript and the briefs currently before the Board.

BACKGROUND

Herrin is the present operator of a sanitary landfill facility located in the County of Williamson, State of Illinois. The facility is operated as a sanitary landfill, under Agency Operating Permit No. 1975-6200P and designated with Site Code No. 1998580001.

On September 16, 1988, Thomas Edmondson, of the Agency, inspected the above-described landfill. On the basis of Mr. Edmondson's inspection, the Agency determined that Herrin, on the day of the inspection, had operated the site in violation of the following provisions of the Illinois Environmental Protection Act (Act):

- 1) Uncovered refuse remaining from a previous operating day, in violation of Ill. Rev. Stat. 1987, ch. 111½, par. 1021(p)(5).
- 2) Failure to collect and contain litter from the site by the end of each operating day, in violation of Ill. Rev. Stat. 1987, ch. 111½, Par. 1021(p)(12).
- 3) Acceptance of wastes without necessary permits, in violation of Ill. Rev. Stat. 1987, ch. 111½, par. 1021(p)(7).
- 4) Deposition of refuse in any unpermitted portion of the landfill, in violation of Ill. Rev. Stat. 1987, ch. 111½, par. 1021(p)(9).

Herrin filed a Petition For Review on December 20, 1988. In the petition, Herrin denied the existence of the conditions complained of at the landfill facility.

The Act (Sec. 31.1(d)(2)) sets forth the findings the Board may make subsequent to a hearing or such an appeal:

In such hearings, the burden of proof shall be on the Agency or unit of local government. If, based on the record, the Board finds that the alleged violation occurred, it shall adopt a final order which shall include the administrative citation and findings of violation as alleged in the citation and shall impose the penalty specified in subdivision (b)(4) of Section 42. However, if the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.

ALLEGATIONS

Uncovered Refuse

In support of its determination that Herrin failed to provide daily cover, the Agency submitted photographs (Exh. 2,3,5,6,7) taken by Mr. Edmondson during his site inspection of September 16, 1988. Exhibits 2 and 3, taken at 7:22 a.m. (R.28-30) depict a bulldozer covering refuse. The gate to the landfill was locked when the inspector took the photographs in evidence, and remained locked until 8:00 a.m. (Exh. 2,3). (R.10-13).

The permit for this landfill requires that at the end of each operating day 12" of cover be applied (R.18). The above-described photographs and the testimony of Mr. Edmondson (R.10-14, R.28-30) demonstrate that the requirement had not been met for the refuse disposed of on at least the immediately preceding workday.

Herrin's witness, Mr. Terry McEvers, stated on direct examination that some of the uncovered refuse in question "had been previously covered but had been eroded by the large amount of rain that we had at that point in time". (R.83). Mr. McEvers further stated that it had been raining. (R.84). On cross-examination, the witness could not state the amount of rainfall, nor the dates.

Q. You indicated that there were rainy conditions some time previous - or did it rain the day of the inspection?

A. No, it wasn't raining the day of the inspection.

Q. Did it rain the day before?

A. It had rained previously, whether it be two or three days before or what, I couldn't say, but there was muddy conditions.

Q. Do you have a weather report?

A. No.

Q. How much did it rain, in your opinion, in the week before the inspection?

A. I have no idea.

(R.96).

Herrin did not submit any further evidence depicting conditions which would support a determination of uncontrollable circumstances. (In the Matter of Dan Heusinkved, AC 87-25, Docket A, slip op. at 6, (January 21, 1988); In the Matter of Village of Rantoul, AC 87-100, slip op. at 8 (September 27, 1988)).

The Board finds this is not a situation where Herrin has proven the violations' resulted from uncontrollable circumstances. Based on the evidence submitted by the Agency, the Board finds that Herrin operated the landfill in violation of Section 21(p)(5) of the Act.

Failure to Collect and Contain Litter

In support of the allegation that litter from a previous operating day had not been collected and contained, the Agency submitted testimony of Mr. Edmondson and photographs taken during the inspection. Additionally, the Inspection Report Form, completed on September 16, 1988 and attached to the Administrative Citation contained written observations of Mr. Edmondson. (Pet. Exh. 4-11; R. at 29-33, 50-51).

The photographic evidence depicts refuse in an area distinctly different from the working face of the landfill. As the Board held in an earlier case:

There is a locational aspect to an administrative citation alleging a litter violation. The location of the refuse in question, not its appearance is dispositive as to whether it constitutes "litter" within the context of Section 21(p)(12) of the Act".

County of Dupage v. E & E Hauling,
AC 88-76, Docket A & B and AC 88-
77, Docket A & D, slip Op. at 6
(September 13, 1989).

Herrin's witness McEvers stated that the city has constructed litter fences, both fixed and movable, in an attempt to capture blowing litter (R.87-91). Also, McEvers stated that the EPA had not offered any guidance as to solving the litter problem other than the suggestion of hiring litter pickers. (R.91). Herrin's engineer, D. Lipe, stated that "I think I've only been on one landfill site in the last five years that hasn't had blowing litter all over it and that was in Alabama, and that's because of the type of process they had down there". (R.112). On further questioning, the engineer stated:

Q. Well, structurally, what could be done to completely eliminate this litter problem?

A. I don't think there's any way you can eliminate the litter problem at any landfill. I think you can go statewide here in the state of Illinois, and I think you'll find every one of them has blowing litter problems. The only thing you can do is try to stay on top of the problem.

Q. What better techniques could the city employ to resolve this wind blown litter?

- A. There really aren't any good techniques to control blowing litter of any sort.

(R.113).

The Board addressed the issue of litter containment in In the matter of Dan Heusinkved, AC 87-25, Docket A, slip Op. at 6, (January 21, 1988). (See also County of Dupage v. E & E Hauling, Inc., AC 88-76, Docket A and B and AC 88-77, Docket A & B, (September 31, 1989). In finding a violation of Section 21(p)(12) the Board held:

The Board is aware that litter control may at times, particularly during high winds, be difficult. However, this does not mean that litter control is impossible nor that the regulations regarding litter control are impractical. It is precisely because litter control is at times difficult that it is necessary for policing of litter dispersement when the ability to contain litter is less than optimal. Respondent has failed to show that on January 23, 1987, it had undertaken this necessary policing.

(In the matter of Dan Heusinkved, AC 87-25, Docket A, slip Op. at 6, (January 21, 1988).

Nowhere does Herrin contend that the litter shown in photos 10 and 11 all derived from refuse brought to the site on the day of inspection. Nor does Herrin present any evidence that weather conditions or other uncontrollable circumstances on the previous day prohibited it from collecting and containing the litter.

Based on the evidence submitted by the Agency, the Board finds that Herrin operated the Herrin landfill in violation of Section 21(p)(12) of the Act.

Deposition of Refuse in any Unpermitted Portion of the Landfill

In support of its allegation that Herrin deposited refuse in an unpermitted portion of the landfill the Agency offers testimony of Mr. Tom Edmondson and Mr. Gerald Steele and a photocopy of the landfill plansheet that appears on page 4 of the original set of plansheets (Exh. 1) which were submitted to the Agency with the original permit application (R 9,20).

During Mr. Edmondson's inspection of September 16, 1988 he observed waste being accepted and deposited in an area designated by the plansheets as Area "B". (R. at 21). Mr. Edmondson stated that the facility is permitted to accept refuse in Area "A"

only. (R.20).

Gerald Steele, of the IEPA, division of Land Pollution Control, Marion field office, chronicled the attempted and failed permit applications for an operating permit outside of Area A. (R.58-68).

Herrin's witness, McEvers, who is responsible for day to day operation of the landfill, on direct examination stated:

Q. How are you now operating?

A. We're operating off the permitted area.

Q. Have you sought a permit?

A. Yes, we have.

Q. Looking at specifically violation citation Roman numeral 4, deposition of refuse in any unpermitted portion of the landfill. Can you explain that violation?

A. That's basically the same thing as I just explained earlier. We're depositing waste in an area not permitted.

(R.87).

On cross examination McEvers stated:

Q. What are you supposed to do when a permitted area fills up and you still want to dump?

A. What am I supposed to do?

Q. Uh-huh.

A. Consult with the Mayor and the Council.

Q. Did you do that?

A. Yes, I did.

Q. What did they tell you to do?

A. Continue to operate.

Q. Are you saying that they told you to continue to dispose of refuse outside the permitted area?

A. That's correct.

Q. Did you find any problem with that?

A. No.

Q. You agreed with that?

A. Yes.

Q. When was area A filled to capacity?

A. I can't put a particular time, it would be some time in late '86, I believe.

(R.98).

Based on the evidence submitted by the Agency and the admissions of Herrin's own witness, the Board finds that Herrin operated the landfill in violation of Section 21(p)(9) of the Act.

Acceptance of Wastes Without Necessary Permits

The Agency alleges that Herrin accepted waste at the landfill without having necessary permits in violation of Section 1021(p)(7) of the Act.

The Agency argues that in order for the facility to accept refuse for disposal in area B, Herrin needs an operating permit for that area. The Agency asserts the action of accepting refuse for deposition in an area not covered by an operating permit gives rise to a violation of Section 21(p)(7) in addition to 21(p)(9) of the Act. (R 20-21).

In direct examination Inspector Edmondson attempted to distinguish the two violations.

Q. Now, it sounds as though you might be saying the same thing with regard to the allegation that the site accepted waste without necessary permits and the allegation that the site disposed of refuse in an unpermitted area. Could you please differentiate one from the other?

A. In other words, to receive refuse and deposit it, you must have the necessary permits to accept waste, and the other one is that they knowingly knew they were off their permitted area, permitted A, and were still accepting refuse and

depositing refuse in area B.

(R. 27-28).

The Agency in its brief alleges that Herrin "did not have an operating permit for that area but nevertheless accepted refuse with the specific intent to dispose of it in area B, which gives rise to the charge of accepting waste without the necessary permits". (Ag. brief at 4).

The Board cannot accept the Agency's construction of Section 21(p)(7) of the Act. Section 21(p)(7) of the Act states:

No Person shall:

d. conduct a sanitary landfill operation which is required to have a permit under subsection (p) of this Section, in a manner which results in any of the following conditions:

7. acceptance of wastes without necessary permits;

Ill. Rev. Stat. 1987, ch.
111½, par. 1021(p)(7)

This would include allegations of acceptance of special wastes at a sanitary landfill which does not have a permit to accept special wastes.

Under Section 21(p)(7), acceptance of a waste without the necessary permits is a violation. The waste Herrin was accepting was authorized in its permit. Section 21(p)(7) does not state that acceptance must be combined with a specific intent to deposit the refuse in an area without a current operating permit. The Agency is attempting to impose two penalties for the same offense. County of Dupage v. E & E Hauling, Inc., AC 88-77, Docket A & B, and AC 88-77, Docket A & B, slip op. at 6 (Sept. 13, 1989)

To deposit refuse in an unpermitted portion of the landfill would naturally imply "acceptance" of the refuse at the landfill. The Agency has not alleged facts distinct from those used to support its allegations of violation of 21(p)(9). Nor has the Agency alleged that the type of waste accepted was improper under Herrin's permit. However, the Board notes that under other circumstances it could be possible to simultaneously violate both sections at the same facility.

The Board, therefore, does not uphold the Agency's determination that Herrin was in violation of Section 21(p)(7) of

the Act.

PENALTIES

Penalties in Administrative Citation actions of the type here brought are prescribed by Section 42(b)(4) of the Act, to wit:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) or (q) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979 as amended; 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.

Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$,
par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of \$1,500 based on the three violations as herein found. For purposes of review, today's action (Docket A) constitutes the Board's final action on the matter of the civil penalty.

Respondent is also required to pay hearing costs incurred by the Board and the Agency. The clerk of the Board and the Agency will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Herrin. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed. Additionally, Docket B will be opened to treat all matters pertinent to the issue of costs.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Respondent is hereby found to have been in violation on September 16, 1988, of Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1021, (p)(5), and in violation on September 16, 1988 of Ill. Rev. Stat. 1987, ch.

111½, par. 1021(p)(12), and in violation on September 16, 1988 of Ill. Rev. Stat. 1987, ch. 111½, par. 1021(p)(9).

2. Within 45 days of this Order of December 6, 1989 Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$1,500 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:


Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, IL 62706

3. Docket A in this matter is hereby closed.
4. Within 30 days of this Order of December 6, 1989 the Illinois Environmental Protection Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Herrin. Within the same 30 days, the Clerk of the Pollution control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Herrin. Such filings shall be entered in Docket B of this matter.
5. Respondent is hereby given leave to file a reply/objection to the filings as ordered in 4) within 45 days of this Order of December 6, 1989.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 ½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 6th day of December, 1989, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board