

**BEFORE THE ILLINOIS POLLUTION CONTROL
BOARD**

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STATE OF ILLINOIS
Pollution Control Board

COUNTY OF JACKSON,

Complainant,

vs.

EGON KAMARASY,

Respondent.

AC No. 2004-064

RESPONDENT'S POST-HEARING BRIEF

I

INTRODUCTION

The County of Jackson ("County") seeks to impose civil penalties for three (3) alleged violations of the Act.

Mr. Kamarasy denies that his actions violated the Pollution Control Act.

II

FACTUAL AND PROCEDURAL BACKGROUND

For the sake of brevity, the respondent refers to and incorporates herein the Factual and Procedural Background section of his Memorandum Supporting Petition to Contest Administrative Citation filed at the hearing on November 22, 2004. It accurately states the evidence that was adduced at the hearing.

Don Terry, a solid waste inspector employed by the Jackson County Health Department, with seventeen (17) months on the job¹ and no prior relevant experience (Tr. 7 - 8, 18 - 19), testified that he conducted a five-minute inspection of the site² on March 25, 2004,

¹ At the time of the inspection of the site involved in this case and on the date of his written report that was admitted into evidence, Mr. Terry had been a solid waste inspector for only approximately eight (8) months.

² "The site" shall mean and refer to the property owned by the respondent that is identified in the Administrative Citation.

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and took two photographs (Tr. 15; P 12) that were introduced into evidence. (P 24 - 26). The inspection was done only visual, and no testing or sampling was done (Tr. 30)

Based upon this cursory inspection, Mr. Terry prepared a written report and concluded that at least ten (10) violations of the Act had occurred. (P 14) Though on direct examination he stated that this report accurately reflected the condition of the site and his observations (Tr. 17), on cross-examination, Mr. Terry admitted that he saw no dumping occurring at the site and only assumed that the material he observed had been dumped there. (Tr. 25 - 27) He did not know the origin of the material, except for what Mr. Taylor had told him. (Tr. 25 - 27, 29) And, his interview with Mr. Taylor during a previous visit indicated that the material in the pile was brush and landscape waste that had been cut and gathered from the respondent's farm. (Tr. 27 - 28)

Interestingly, in this case, the complainant issued no written violation notice to the respondent, as it had done in January with respect to the site involved in AC 04-63. (Tr. 41 - 42, 61)

On March 30, 2004, the County filed the Administrative Citation against the respondent in this cause. Although containing more legal conclusions than facts, the Administrative Citation charges the respondent with three (3) violations of the Act: (1) that the respondent caused or allowed open dumping that resulted in litter at the site in violation of 415 ILCS § 5/21(p)(1); (2) that the respondent caused or allowed open dumping that resulted in open burning at the site in violation of 415 ILCS § 5/21(p)(3); and (3) that the respondent caused or allowed open dumping at the site that resulted in the deposition of general construction or demolition, or clean construction or demolition debris in violation of 415 ILCS § 5/21(p)(7).

The respondent timely filed an Amended Petition to Contest Administrative Citation in which he denied that his conduct violated the Act.

At the hearing, Mr. Terry testified on direct examination that on March 25, 2004, he observed a ten (10) cubic yard pile that contained ash, charred remains of lumber, mattress springs and charred metal. (Tr. 14 -15)

Mr. Terry testified further "there are no dwellings on the site" (Tr. 16), but that the respondent owned land adjacent to the site. (Tr. 17 – 18)

Mr. Terry also testified that he saw no evidence that the material he found on the site had been transported there from elsewhere and that the charge made in his investigation report (P 14) was merely assumption, not based upon direct evidence. (Tr. 25 – 26)

Mr. Terry further testified that during a visit to the site made on March 11, 2005, he spoke to Mr. Taylor, who stated that he was getting ready to burn brush that he had cut on the respondent's farm. (Tr. 26 – 27)

At first, Mr. Terry testified that he told Mr. Taylor not to burn the brush. (Tr. 27) Then, Mr. Terry testified that he told Mr. Taylor he could burn the landscape waste, but he had to remove the couch or mattress from the pile. (Tr. 28) Then, when confronted with the statement in his report that he had told Mr. Taylor that the pile was not to be burned because burning it would violate the Pollution Control Act, Mr. Terry admitted that this was what he told Mr. Taylor on March 11, 2004. (Tr. 28)

Mr. Terry testified that no tires were in the pile. (Tr. 28)

Mr. Terry stated that he saw no open burning on March 25, 2004, only what he believed to be evidence that a fire had occurred previously. (Tr. 29)

Mr. Terry testified that the pile of materials at the site measured ten (10) cubic yards. (Tr. 38)

Finally, Mr. Terry testified that he could see this small pile with the naked eye from the public road, Green Ridge Road (Tr. 38), but admitted he had to exit from the public road and travel north some distance to a point where he entered the respondent's property and passed through a gate to reach the site. (Tr. 38 - 40) He had no warrant. (Tr. 39) He did not have the respondent's permission to enter onto the private property. (Tr. 42)

Based upon this evidence, the County asked the Board to find three (3) violations of the Act and to assess a fine in the amount of One Thousand Five Hundred and no/100 Dollars (\$1,500.00) for each violation.

The respondent denies violating the Act and specifically denies causing any pollution.
(Tr. 60)

The site is rural, unimproved land that is used to pasture horses and for hay production. It is part of the respondent's 200-acre farm. (Tr. 59) Except for the respondent's residence there are no other residences nearby and the land is located within the unincorporated area of Jackson County. (Tr. 59 - 60) The respondent's home is adjacent to the tract of land on which the site is located. (Tr. 59)

The respondent testified that he did not believe that he was violating the Pollution Control Act in having a burn pile for household, landscape and agricultural waste generated by his household and on his farm on which the site is situated. (Tr. 60)

All of the materials shown in the inspector's photographs of the site came from the respondent's farm and home. (Tr. 61, 62) The respondent denied that any window air conditioner was ever in the pile. (Tr. 63) The respondent admitted that old furniture from his home had been burned in the pile (Tr. 63), but all other stuff in the pile that was ever burned was landscape and agricultural waste that was generated on the respondent's horse farm, such as fence posts, brush and fallen trees. (Tr. 62 - 64) Metal fence posts were put in the burn pile to remove poison ivy and other vines. (Tr. 64) No tires were ever burned. (Tr. 71)

Mr. Taylor removed the mattress, shown in one of Mr. Terry's photographs taken on March 11, 2004, prior to burning the pile. (Tr. 61, 70 - 73) Mr. Taylor testified that a couch and a mattress that were in the pile on the site on March 11, 2004 had been stored by the respondent in a "lean-to against the barn". (Tr. 72)

Mr. Taylor also testified that there was a metal piece of a sink in the pile that was burned, but no air conditioners or laminate counter tops. (Tr. 72)

The pile shown in Mr. Terry's photographs is located more than 500 feet from the public road and was not visible or observable from the public road. (Tr. 62) One had to exit from the public road, travel approximately 200 feet along a private lane, then pass through a gate, and traverse another 300 feet to reach the site. (Tr. 62)

60) The respondent gave no permission to the complainant to enter onto his property. (Tr.

III

ARGUMENT

A. The complainant violated the Fourth Amendment by entering onto the respondent's land for the purpose of inspecting for illegal debris piles without either the respondent's consent or obtaining a search warrant.

The respondent argued in his Memorandum Supporting Amended Petition to Contest Administrative Citation ("Resp. Memo") that a search occurred without a warrant and in the absence of exigent circumstances that might excuse a warrantless search. (Resp. Memo, 6 – 8)

The complainant argues in its post-hearing brief that the inspector stated that he could see the pile of material from the public road and that the respondent had not met its burden of persuasion that exigent circumstances did not exist to justify a warrantless search. (Complainant's Post-Hearing/Closing Argument, 9)

However, it is the burden of the complainant to show the exigent circumstances that justify warrantless searches. It is not the burden of the landowner to show that no exigent circumstances existed.

And, while the inspector testified that he could see the pile from the public road, the respondent flatly contradicted that assertion. The inspector's own testimony casts doubt on the credibility of his statement that the pile was visible from the public road, since the inspector had to drive off the public road, onto a private lane, and through a gate to reach the pile.

In any event, even if the pile was visible from the public road, there was no showing that the pile would or might disappear within the time it might take to obtain a warrant to enter the premises and conduct a search. In fact, the inspector claims the pile was present more than two weeks earlier when he made a similar, warrantless entry and search of the respondent's

premises for violations of the Pollution Control Act. The complainant presented no evidence of exigent circumstances to justify the warrantless search.

The so-called "broad authority" to enter onto private property to conduct searches that is claimed by the complainant in this case is defied by the cases, the Illinois Constitution and the Pollution Control Act itself. The inspector's authority in this area is strictly limited by constitutional and statutory guidelines. It is, indeed, not "broad" as the complainant asserts in its closing argument, but is sharply constrained by constitutional limitations.

The charges should be dismissed due to the illegal entry upon and search of the respondent's property by the complainant, which violated not only the Illinois Constitution, but also the Pollution Control Act itself, which expressly imports constitutional limitations into its statutory framework.

B. The preponderance of the evidence does not show that the respondent caused or allowed open dumping on the site.

The respondent first asserts in his Memorandum Supporting Amended Petition to Contest Administrative Citation that since none of the stuff in the pile was "garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility", the complainant must mean to incorporate all the items in the pile under the catch-all phrase "discarded material" and that, while that phrase could be stretched to mean almost anything, the Illinois legislature surely did not intend the Board to consider vegetative matter, such as tree branches and landscape waste, set out in a farmer's burn pile, as the kind of "discarded material" that creates or constitutes an "open dump". (Resp. Memo 8). Then, he argued that open dumping requires creating a "disposal site" and that any interpretation of the phrase "disposal site" that included every homeowner or farmer who burned a pile of leaves or branches would render the Pollution Control Act so broad as to be arbitrary and unenforceable. (Resp. Memo 8 +9)

Third, the respondent contends that the "open dumping" element of the violations charged requires a showing that the material placed on the site "entered the environment",

emitted into the air, or discharged into the waters in some demonstrable way. The respondent asserted that the pile of materials did not constitute a disposal site since the complainant's evidence did not show that the respondent placed the material on his own land in such a way that it, or any constituent thereof, was entering the environment or emitting into the air or discharging into the waters. (Resp. Memo 9 – 13)

The complainant restates its denial that any actual pollution or entering into the environment is required for something to constitute a disposal site, which is a prerequisite for a finding of "open dumping". (Complainant's Post-Hearing/Closing Argument, 10)

But, the complainant's position fails to explain why a violation of the Pollution Control Act does not require some form of pollution and renders superfluous and nugatory language that the legislature included in the definition of the terms involved in this case.

C. The respondent did not cause or allow open dumping that resulted in "litter" at the site.

The respondent does not believe that his act of burning some stuff on his own homestead, in a location not visible from the public road, and in a manner that did not cause a public nuisance, can reasonably be characterized as causing or resulting in "litter".

The respondent argued in his Memorandum Supporting Amended Petition to Contest Administrative Citation that the legislature, by adding the phrase "that resulted in litter" in § 21(p) of the Pollution Control Act, intended that not all items left at a "disposal site" constitute "litter"; and, that the Board, in adopting the definition of "litter" used in the Litter Control Act, put the respondent and others on notice that causing litter under the Pollution Control Act means exactly the same thing as unlawful litter under the Litter Control Act. (Resp. Memo, 13 – 17) He then pointed out that unlawful litter under the Litter Control Act, in cases of depositing materials on one's own land, requires a showing that the respondent's actions created a public health or safety hazard, a public nuisance or a fire hazard; and, in cases of allowing materials to accumulate on one's own land, a showing that the accumulation

constitutes a public nuisance or “may be blown or otherwise carried by the natural elements on to the real property of another person”. (Resp. Memo, 17)

No evidence supporting a finding of public nuisance, public health, safety or fire hazard, or blowing or scattering onto the real property of others was presented at the hearing and none is contained in the record. Therefore, the respondent should not be found in violation of the Pollution Control Act for his activities at this site.

Not surprisingly, the complainant restates its argument that finding a violation of the Pollution Control Act for causing litter does not require finding that the landowner who places materials on his own land created a public nuisance, health, safety or fire hazard, or that the accumulation of the materials constituted a public nuisance or blew or scattered freely onto the property of others. (Complainant’s Post-Hearing/Closing Argument, 10)

But, the result of the complainant’s position is to emasculate any standards or limits from the Pollution Control Act, cause constitutional infirmities of a lack of due process, and interfere with the Separation of Powers provisions because the discretion of the executive branch, the complainant and its inspectors, is unbridled and subject to arbitrary and capricious application.

For this reason, the complainant’s position is infirm and should be disregarded.

D. The respondent did not cause or allow open dumping that resulted in open burning at the site in violation of the Act.

The respondent argued in his Memorandum Supporting Amended Petition to Contest Administrative Citation that open burning of “agricultural waste”, “domicile waste” and “landscape waste” does not violate the Pollution Control Act because those activities are exempted by IEPA regulations. (Resp. Memo, 18 – 19)

The complainant argued that the cited exemptions do not apply to administrative citations brought under § 21 of the Act. (Complainant’s Post-Hearing/Closing Argument, 11) However, the complainant cites no authority for its position.

But, the overreaching of the Act and the disrespect for the law that will result if the Act is interpreted so as not to allow burning of agricultural, household and landscape waste in the circumstances outlined by the cited IEPA regulations is sufficient justification for the application of those exemptions to the Act.

The complainant's position on this issue, as with the other issues in this case, far overreaches the reasonable limits of the Act and would seek to create in the Act a supreme vehicle for behavior control without respect to the legislative aim of environmental protection.

Assessing a huge fine for burning such a small pile of landscape, agricultural and household waste in an isolated, rural area, as the complainant urges in this case, should not be countenanced by the Board because it will send the wrong message and will encourage the complainant to ignore the significant environmental problems within its jurisdiction and concentrate the power of the State upon the homeowner and small farmer for burning leaves and tree branches.

E. The respondent did not cause or allow open dumping on his own land that resulted in the deposition of general construction or demolition or clean construction debris in violation of the Act.

The respondent argued in his Memorandum Supporting Amended Petition to Contest Administrative Citation that the definitions of the terms "general construction or demolition debris" and "clean construction or demolition debris" require at least some circumstantial evidence that some construction or demolition activity was taking place that resulted in the deposition of the materials in question and no evidence was presented showing anything except that some items from the respondent's agricultural operation and household were in the pile at the site and no construction or demolition activities were shown, except for the replacement of old fence posts. (Resp. Memo, 19 - 21) The respondent further argued that the complainant, who bears the burden of proof in showing that there was construction or demolition debris in the small pile on this site, could not do so. (Resp. Memo, 21) It did not.

The complainant argues that the lumber and old fence posts it contends were in the pile meet the definitions of construction or demolition debris. (Complainant's Post-Hearing/Closing Argument, 11)

But, the complainant again ignores the exceptions within the Act for burning agricultural, landscape and household waste and urges that even if the items mentioned might be burned under the Act, the act of depositing them on one's own land for the purpose of a burn, is a violation of the Act. This is an illogical and untenable position. The Board should not authorize it.

F. The respondent is denied due process of law if he is found to have violated the Act for depositing the materials found at the site for the purpose of burning them.

The respondent argued in his Memorandum Supporting Amended Petition to Contest Administrative Citation that he was lawfully entitled to burn waste generated from his farming operations, landscape waste and domicile waste on his own land, therefore, it would violate his due process rights if the Act is interpreted in such a way that the act of depositing these items on his own land for the purpose of disposal by burning constitutes a violation, but the disposal by burning is not a violation because there would be no way for the respondent to reasonably determine whether his conduct was lawful or not. (Resp. Memo, 22 -23)

Because the collecting of the material for burning in this case and the act of burning the materials was really a single continuous act, the Board should find that the collecting of the materials (1) was not an act of open dump, (2) did not cause or result in unlawful litter, and (3) was not an act of depositing construction or demolition debris in the sense intended by the Legislature when it passed the Pollution Control Act.

G. The complainant's position in this case and the interpretations it urges the Board to take of the Act deny due process of law by ignoring or diminishing the notions that some kind of demonstrable environmental harm is required to find a violation of the Act; and violate constitution principles of Separation of Powers by substituting the inspector's "I know it when I see it" definition of litter and open dumping rather than carefully applying the guidelines set forth in the Litter Control Act.

The respondent here incorporates expressly and reiterates the arguments contained in Respondent's Memorandum Supporting Amended Petition to Contest Administrative Citation that show the constitutional infirmities resulting from the complainant's positions and interpretations urged on the Board.

For those reasons, no violations alleged by the complainant can be found based on the record in this case.

IV

CONCLUSION

The administrative citation filed against the respondent in this case overreaches the Act and, unless repressed by dismissal by the Board, can foster nothing but disrespect for an important law.

The inspector discovered the pile at the site in question only by conducting an illegal search of the respondent's property. Therefore, all evidence of the existence of this pile should be suppressed and disregarded.

The pile of material in question did not constitute a "disposal site" or an "open dump", as those terms are defined in the Pollution Control Act.

There was no general construction or demolition debris within the pile: only lumber or wood items that came from the respondent's farm and homestead.

The pile itself would not be considered "litter" in violation of the Litter Control Act. Therefore, it cannot be considered "litter" in violation of the Pollution Control Act.

It was an abuse of discretion to charge the respondent with three separate violations for one allegedly wrongful act. The essential "crime", which the respondent "committed", if any, was to create a burn site on his farm to dispose of household, landscape, and agricultural waste generated on the farm by his farming and normal household activities.

But that open burning charge must be dismissed because the IEPA regulations expressly permit this kind of burning activity, provided certain conditions are met, which the respondent obviously did meet.

The only way for this Board to convict the respondent on any of these three counts would be to interpret the legal terms "open dump" and "litter" so expansively and arbitrarily as to violate the respondent's due process right to be able to reasonably anticipate what is illegal and what is not. In addition, the interpretation would have to be so broad as to give the administrative branch of the government too much discretion regarding both the decision about what is litter and the amount of penalties to be imposed for a particular act. This would violate the Constitutional principle of Separation of Powers.

The respondent did not violate the Act as alleged in the Administrative Citation.

This whole case involves a pile of landscape and agricultural waste measuring only ten (10) cubic yards. Yet, the complainant attempts to extract a fine in the amount of Four Thousand Five Hundred and no/100 Dollars (\$4,500.00).


In addition to the legal and constitutional principles that preclude any finding that violations of the Act occurred in this case, one cannot help but be reminded of the age-old legal maxim that served as a defense for a mythical, young lawyer in the following adage: "There was a young lawyer named Rex, with diminutive organs of sex. When charged with exposure, retained his composure.: 'de minimus non curat lex'."

The complainant must not be permitted to make the respondent's small burn pile on his farm in a secluded, rural area into a multiple count case under the Act.

For all of the foregoing reasons, the administrative citation in this case should be dismissed.

Dated this 31st day of January, 2005.

EGON KAMARASY, Respondent

By 
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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am over eighteen (18) years of age, employed in the County of Jackson, State of Illinois, in which county the within mailing occurred, and not a party to the subject cause. My business address is: 3200 Fishback Road, P. O. Box 1206, Carbondale, Illinois 62903-1206.

I served the following document, Respondent's Post-Hearing Brief (AC 04-64), of which true and correct copies thereof in the cause are affixed, by placing the original and four (4) copies thereof in an envelope addressed as follows:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago IL 60601-3218

and one (1) copy in an envelope addressed as follows:


Jackson County State's Attorney
Jackson County Courthouse, 3d Floor
Murphysboro IL 62966

ATTN: Daniel Brenner, Assistant State's Attorney

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Carbondale, Illinois, on January 31, 2005.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2005 at Carbondale, Illinois.


(Signature)

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