ILLINOIS POLLUTION CONTROL BOARD
March 31, 1994

LAKE COUNTY FOREST PRESERVE DISTRICT,	)	
Complainant,	)	
v.	)	PCB 92-80 (Enforcement)
NEIL OSTRO, JANET OSTRO, and BIG FOOT ENTERPRISES,	)	
Respondents.	)	

MARK STANG AND PETER FRIEDMAN, of BURKE, WEAVER & PRELL, APPEARED ON BEHALF OF COMPLAINANT; and

JAY NELSON AND JACK WATSON, of SCHAFFENEGGER, WATSON, & PETERSON, APPEARED ON BEHALF OF RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on Lake County Forest Preserve District's (District) May 29, 1992 complaint, as amended on February 16, 1993, against Neil Ostro, Janet Ostro, and Big Foot Enterprises (collectively, the Ostros). The complaint is brought pursuant to Section 31(b) of the Environmental Protection Act (Act), which allows any person to file with the Board an enforcement action alleging violations of the Act or Board rules. (415 ILCS 5/31(b) (1992).) The Ostros are previous owners of property acquired by the District by condemnation. The District alleges violations of Sections 21(a), 21(e), 21(f), and 21(m) of the Act. (415 ILCS 5/21(a), (e), (f), and (m) (1992).)

Hearings were held on November 12 and December 14, 1992, and on January 18, 20, and May 19, 1993. No members of the public attended. The parties subsequently filed briefs, as well as a number of motions related to discovery disputes.

For the reasons set forth below, we find that the Ostros violated Sections 21(a), (e), (f)(1), and (m) of the Act.

BACKGROUND

This case involves a 15.4 acre tract of land located at the northwest corner of Sunshine Avenue and Route 45 in Lake Villa,

Lake County, Illinois. (Am. Joint Exh. 14 at 1.)[1] Neil Ostro, along with two others, acquired the property on or about May 1, 1970. Neil Ostro and his partners operated a day camp, known as Camp Malibu, on the property. (Tr. at 196.). In 1976 Neil Ostro became the sole owner of the property. (Am.Joint Exh. 14 at 2.) Neil and Janet Ostro resided on the property from 1976 to 1988. (Am. Joint Exh. 14 at 3.) The Ostro's tenant, Richard Ramlow, lived on the property from 1988 until May 1990. (*Id.*) On or about May 7, 1986, Neil Ostro conveyed legal and equitable title to the property to Janet Ostro. (Am. Joint Exh. 14 at 2.) The District began condemnation proceedings against the property in 1988, and on December 22, 1989 the District acquired fee simple title to the property for $385,000. (Am. Joint Exh. 14 at 2-3.) The District took possession of the property on May 30, 1990.

In the mid-1970s, Neil Ostro purchased twenty 55-gallon barrels of paint. Neil Ostro used the paint to paint buildings and other objects at the day camp. All of the paint was used, with the exception of two full barrels and one partially used barrel. (Am. Joint Exh. 14 at 3; Tr. at 205.) Neil Ostro did not use any of the paint after 1980. (Tr. at 206, 397.) The empty barrels, as well as the barrels with paint remaining in them, were placed on the east side of the property, along Route 45. (Am. Joint Exh. 14 at 3; Tr. at 208-209.) The Ostros did not cover the barrels or provide any type of liner between the barrels and the ground. (Tr. at 209-210.) The Ostros made no arrangements to dispose of the barrels before the District acquired the property in 1989. (Tr. at 218, 225-226.) There were approximately 15 barrels left on the property after the District took possession of the property on May 30, 1990. (Am. Joint Exh. 14 at 3.)

Between November 1990 and January 1991, District employees worked on the property demolishing the buildings on the property. (Tr. at 73, 117, 140.) In December 1990, three of those employees discovered the barrels. Those employees, Paul Wagner, Edward Sands, and Dennis Dougherty, testified that the barrels were almost completely buried in the side of the berm near Route 45. (Tr. at 74-76, 118, 141.) Wagner and Sands testified that the barrels had holes in them and were frail, rusty, and stacked on top of each other. (Tr. at 125, 142-143.) Both men stated that at least one of the barrels was leaking a black "tar-like" substance or heavy oil from a hole in the bottom of the barrel. (*Id.*)

After discovering the barrels, the District contacted the Illinois Environmental Protection Agency (Agency) emergency

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[1] Amended Joint Exhibit 14 is a stipulation of facts agreed to by the parties.

response team. (Tr. at 254.) The response team told the District that the District would have to conduct further sampling and testing, and that the site would have to be cleaned up, including the removal of all contaminated soil. (Tr. at 255.) The District then contacted the Ostros to tell them that they must remove the barrels. The District directed the Ostros to contact Brian Martin of the Agency for guidance in complying with environmental laws. (Tr. at 403-404.) Neil Ostro contacted Martin, and then sent an August 21, 1991 letter to the District stating that he had contacted a lab and a licensed waste hauler, and that it appeared that the work could be completed in 120 days. (Am. Joint Exh. 14 at 4; Joint Exh. 3.)

On August 26, 1991, Safety-Kleen, Inc., which had been retained by the Ostros, took a sample of the contents of one of the barrels, and conducted laboratory tests on that sample. (Am. Joint Exh. 14 at 4; Joint Exh. 4.) In the fall of 1991, Neil Ostro and Richard Ramlow entered onto the property and used a hook connected to a backhoe to pull the barrels out of the ground. (Tr. at 388-390, 467-471.) Mr. Ostro and Mr. Ramlow placed the barrels which still had paint in them into two yellow 85-gallon overpacks supplied by Safety-Kleen. (Am. Joint Exh. 14 at 4; Tr. at 389, 409.) Eight to ten empty drums were taken to the Cleveland Corporation for recycling.[2] (Tr. at 384, 388-390, 396, 407.) Both Neil and Janet Ostro testified at hearing that they were prepared to have Safety-Kleen dispose of the barrels in the overpacks, but that they could not because the District would not provide the incident number that Safety-Kleen needed to obtain a manifest. (Tr. at 414-416, 425, 453-454.) On November 15, 1991, the District sent a letter to the Ostros stating that the Ostros were not authorized or permitted to enter onto the property without prior written consent of the District. (Resp. Exh. 4.)

On November 14, 1991, Engineering & Testing Services, Inc., retained by the Ostros, took soil samples from the area where the barrels had been. (Am. Joint Exh. 14 at 4; Joint Exh. 5.) On November 15, 1991, the Agency collected soil and water samples from the property. (Am. Joint Exh. 14 at 4; Joint Exh. 6.) On December 30, 1991, the Agency sent a compliance inquiry letter to the District, stating that the District was apparently in

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[2] The record is conflicting as to the date that Neil Ostro removed the barrels. The joint stipulation of facts states that two barrels were placed into yellow overpacks in September 1991. (Am. Joint Exh. 14 at 4.) However, Neil Ostro testified that this occurred in November 1991 (Tr. at 409), and Janet Ostro testified that the date was November 11, 1991 (Tr. at 467).

violation of 35 Ill. Adm. Code 722.111 for failing to provide a waste determination.[3] (Joint Exh. 8.)

The District hired Ecology Services, Inc., to investigate the extent of contamination in the barrel area and to remove any contaminated materials. Ecology Services began that work on March 4, 1992. John Hauser of Ecology Services testified that there was a noticeable solvent-type odor from the excavation made by Ecology Services. (Tr. at 173-174; Comp. Exh. 4-6.) Hauser also testified that he discovered a small stockpile of soil west of the barricaded area, which had the end of a 55-gallon barrel lying on top. (Tr. at 178-180.) Hauser stated that there was some resin-like material leaking onto the pile of soil. (Tr. at 179; Comp. Exh. 8.) Ecology Services took nine soil samples, which were then tested. (Joint Exh. 9.) On July 22, 1992, GSC Environmental, also retained by the District, took a sample of the stockpiled soil, and submitted the sample to Chemical Waste Management for analysis. (Am. Joint Exh. 14 at 5; Joint Exh. 10.) On November 10, 1992, the District received a permit from the Agency to dispose of the stockpiled soil at the CID landfill in Calumet City, Illinois. (Tr. 262; Comp. Exh. 15.)

On November 11, 1992, the Ostros' consultant, Philip Mole, collected five soil samples from the stockpiled soil on the property. Those samples were analyzed by Tenco Environmental Laboratories. (Am. Joint Exh. 14 at 6; Joint Exh. 13.) On November 20, 1992, the District's contractor took samples from the two yellow overpacks, and from a green overpack which contained the fragment of the barrel found by Ecology Services. (Joint Exh. 11, 12; Am. Joint Exh. 14 at 5-6.) The two yellow overpacks were removed from the property by agreement of the parties after the first day of hearing (December 14, 1992). (Tr. at 415.)

OUTSTANDING MOTIONS

There are three motions in this case which have not yet been ruled upon: the Ostros' motion for directed finding, the Ostros' motion for discovery sanctions, and the District's motion for rule to show cause.

At the January 18 hearing in this matter, the Ostros presented a motion for directing finding. A written copy of that motion was filed with the Board on January 22, 1993. On February

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[3] Section 722.111 requires a person who generates solid waste to determine whether that waste is a hazardous waste. (35 Ill.Adm.Code 722.111.)

25, 1993, while ruling upon a discovery dispute, the Board stated that we would defer ruling upon the motion for directed finding until our decision on the merits of the case. The motion for directed finding alleges that the District has not proven: that the Ostros violated any statute or regulation; that there has ever been any Class F listed waste on the property; that there is any contamination of the soil; and that the Ostros deposited any contaminants on the property. Thus, the Ostros moved for a directed finding of no liability. The District responded to the motion at hearing. (Tr. at 282-285.)

The motion for directed finding is denied. The Ostros have not provided any argument or citation to the record in support of their motion. The District argued that it had established that the Ostros had violated Sections 21(a), 21(e), 21(f), and 21(m) of the Act, through Mr. Ostro's testimony and through other testimony and exhibits. We find that the District had carried its burden of establishing a *prima facie* case so as to withstand a motion for directed finding.

The Ostros also moved for discovery sanctions. The Ostros contend that the District's response to its request for production of pictures, slides, motion pictures, or videos of the property was incomplete, and that the District produced 75 additional photographs one business day before the first day of hearing. The Ostros ask that the Board enter appropriate sanctions. In response, the District maintains that all of the photographs which were produced late either came into existence or came to the attorney's attention after the District filed its response on October 14, 1992.

The Board is concerned by the allegations that the District's response to the request for production was incomplete. However, the District has stated that the photographs which were produced after the October response either were taken after that date, or came to the attorney's attention after that date. The hearing officer stated twice that he would accept the Ostros' attorney's representation that he needed more time to prepare, based on the late production. (Tr. at 28-30.) The hearing officer also gave the Ostros additional time to take further discovery (Tr. 38-39, 226-229), and further depositions of the District's witnesses were subsequently noticed. There is no indication in the record that the District intentionally withheld the photographs. Additionally, the Ostros were given additional time for discovery. The motion for discovery sanctions is denied.

Finally, the District filed a motion for rule to show cause. This motion relates to a dispute over a subpoena served by the

District on an insurance adjuster.[4] The District contends that the dispute could have been avoided, and resources saved, if the insurer had tendered the challenged documents to the hearing officer for an *in camera* inspection. Thus, the District asks that the insurer be ordered show cause why it should not be held in contempt, and to pay the District's reasonable expenses in obtaining an order of production.

The motion for rule to show cause is denied. In our April 22, 1993 order, the Board noted its frustration with the dispute surrounding the subpoena. However, after further proceedings before the hearing officer, the dispute was subsequently resolved. We see nothing to be gained at this point by further cluttering this case with matters not related to the alleged violations of the complaint.

ALLEGED VIOLATIONS

A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. This standard of proof requires that the proposition proved must be more probably true than not. Once the complainant presents sufficient evidence to make a *prima facie* case, the burden of going forward shifts to the respondent to disprove the propositions. (Illinois Environmental Protection Agency v. Bliss (August 2, 1984), 59 PCB 191, PCB 83-17.)

Section 21(a)

Section 21(a) of the Act states that no person shall "cause or allow the open dumping of any waste". (415 ILCS 5/21(a) (1992).) The District contends that the Ostros' actions, or inaction, in leaving the empty and full barrels on the property constitutes open dumping. The District argues that because the barrels had already been used for their primary purpose, and then discarded, those barrels are "waste" under the statutory definition. (415 ILCS 5/3.53 (1992).) The District further maintains that the barrels were consolidated, from one or more sources, at a disposal site that does not meet the requirements of a sanitary landfill, and that therefore the definition of "open dumping" is satisfied. (415 ILCS 5/3.24 (1992).)

As to the issue of "cause or allow", the District notes that the Act is *malum prohibitum*, and that proof of guilty knowledge,

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[4] The circumstances of the motion to quash subpoena are set out in the Board's February 25, 1993 and April 22, 1993 orders.

wilfulness, or intent is not necessary to prove a violation of the Act. (People v. Fiorini (1991), 143 Ill.2d 318, 574 N.E.2d 612.) The District argues that the Ostros did not take any steps to ensure the proper storage or removal of the barrels during their ownership of the property, and that the Ostros permanently abandoned the barrels when ownership of the property was transferred to the District. The District maintains that the Ostros caused or allowed the barrels to be dumped on the property, and caused or allowed the substances in those barrels to leak into the surrounding soil. The District concludes that the Ostros' actions constitute open dumping of waste in violation of Section 21(a).

The Ostros do not specifically challenge the District's allegation that their actions violated Section 21(a). The Ostros did contend, in their motion for directed finding, that the District has not proven that the Ostros violated any statute or regulation. However, the Ostros have not provided any evidence, citation to the record, or legal argument in support of that assertion.

The Board finds that the Ostros violated Section 21(a), in that they caused or allowed the open dumping of waste. We agree that the barrels constitute "waste". The Act defines "waste" as "any garbage...or other discarded material..." (415 ILCS 5/3.53 (1992).) It is undisputed that neither the barrels nor the paint remaining in the barrels were not used after 1980. (Tr. at 206, 397.) We find that the barrels, having been used for their primary purpose and subsequently left along the edge of the property, constitute "waste". (See Illinois Environmental Protection Agency v. Thomas (January 23, 1992), AC 89-215, slip op. at 3-4.) We also find that consolidating the barrels along Route 45 constituted "open dumping". There is no allegation by the Ostros that the area along Route 45 meets the requirements of a sanitary landfill.

As to the issue of whether the Ostros "caused or allowed" the open dumping, we agree with the District that the Act is *malum prohibitum*, and that it is not necessary to prove that the Ostros intended, or knew, that their actions violated the Act. (Freeman Coal Mining Co. v. Pollution Control Board (1974), 21 Ill.App.3d 157, 313 N.E.2d 616; Meadowlark Farms, Inc. v. Pollution Control Board (1974), 17 Ill.App.3d 851, 308 N.E.2d 829.) The District has presented evidence that the Ostros purchased the barrels, and placed those barrels along Route 45 on the property. The District has also shown that the Ostros did not provide for proper storage or removal of the barrels while the Ostros owned the property, and that the barrels were left on the property when the District obtained ownership. The Ostros have not disputed any of these facts. The Board finds that the

District presented sufficient evidence to make a *prima facie* case. We also find that the Ostros have not presented any evidence disproving the allegations. In sum, we hold that the Ostros caused or allowed the open dumping of waste, in violation of Section 21(a) of the Act.

Section 21(e)

Section 21(e) of the Act provides that no person shall "dispose, treat, store or abandon any waste...except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder." (415 ILCS 5/21(e) (1992).) The District argues that the Ostros disposed of the barrels, which are "waste", in a manner that allowed the contents of the barrels to leak into the soil. The District also contends that the record shows that the site does not meet any applicable land disposal requirements of the Act, since the Ostros have not produced any permit which would have authorized the Ostros to dump the barrels along Route 45. The District concludes that the Ostros improperly disposed and abandoned waste in an illegal, unpermitted site on the property, and thus violated Section 21(e) of the Act.

The Ostros have not specifically challenged the District's allegations that their actions violated Section 21(e). As noted above, the Ostros did assert, in their motion for directed finding, that the District has not proven that the Ostros violated any statute or regulation. However, the Ostros have not provided any evidence, citation to the record, or legal argument in support of that assertion.

The Board finds that the Ostros disposed, stored, or abandoned waste in violation of Section 21(e). As we found above, the barrels constitute "waste". Additionally, the record clearly shows that the Ostros left the barrels on the property so as to dispose, store, or abandon them. There is no evidence that the area in which the barrels were left meets the requirements of the Act and regulations for a temporary or permanent waste storage or disposal site. The Board finds that the District presented sufficient evidence to make a *prima facie* case. We also find that the Ostros have not presented any evidence disproving the allegations. In sum, we hold that the Ostros violated Section 21(e) of the Act, by disposing, storing, or abandoning waste at a site or facility which did not meet the requirements of the Act and the regulations.

Section 21(f)(1)

Section 21(f)(1) of the Act states that no person shall conduct any hazardous waste disposal operation without a RCRA

permit for the site issued by the Agency. (415 ILCS 5/21(f)(1) (1992).) The District contends that the record shows that the Ostros improperly used a portion of the property as a hazardous waste disposal site, without obtaining a RCRA permit. The District states that although "hazardous waste disposal operation" is not defined in the Act, the term "hazardous waste disposal site" is defined as "a site at which hazardous waste is disposed." (415 ILCS 5/3.16 (1992).) The District further states that the Board's rules establish that a solid waste exhibits the characteristic of corrosivity, and is thus hazardous, if a representative sample of the waste has a pH greater than or equal to 12.5. (35 Ill. Adm. Code 721.122.) The District maintains that it is undisputed that Neil Ostro placed the barrels which still contained material into yellow overpacks purchased from Safety-Kleen. The District states that samples from one of the yellow overpacks show that the material had a pH of 13. (Jt. Exh. 12.) Thus, the District concludes that the solid waste in the overpacks exhibited the characteristic of corrosivity and is a hazardous waste pursuant to 35 Ill. Adm. Code 721.Subpart C.

The District argues that based on the deteriorated condition of the barrels, it is "more than likely" that the hazardous wastes in the barrel subsequently placed in the overpack may have first entered into the environment by leaking into the surrounding soil on the property. The District states that the Act defines "disposal" as dumping waste so that the waste <u>may</u> enter the environment. (415 ILCS 5/3.08 (1992).) In sum, the District argues that Neil Ostro used a portion of the property as a hazardous waste disposal site, without a RCRA permit, in violation of Section 21(f).

In response, the Ostros argue that the District has not met its burden of proof to show that the paint and the soil are hazardous wastes. The Ostros contend that their expert, Philip Mole´, testified that the paint did not contain any concentrations of any substances above regulatory limits (Tr. at 294, 310; Jt. Exh. 4, 11), and that the District did not offer any evidence of any regulatory violation with respect to the paint. The Ostros maintain that it was a barrel fragment that tested above the regulatory limit for corrosivity, and that the District has not shown any evidence of any injury to people or the environment.

In reply, the District disputes the Ostros' allegation that the corrosive material came from a barrel fragment (placed in a green overpack by Ecology Services). The District contends that the record is clear that the material which tested as a pH of 13 came from a yellow overpack which contained viscous material. (Tr. 153-155; Jt. Exh. 12.)

The Board finds that the District has carried its burden of proof to show that the Ostros violated Section 21(f)(1). The District has shown that it was material from one of the yellow overpacks, not the drum fragment, which tested at a pH level of 13. (Tr. at 153-155; Jt. Exh. 12.) Section 721.120 of the Board's rules states that a solid waste is a hazardous waste if it exhibits any of the characteristics identified in Subpart C. Section 721.122(a)(1) states that a solid waste exhibits the characteristic of corrosivity if it is aqueous and has a pH of greater than or equal to 12.5. Thus, that material was hazardous. The Ostros do not dispute that the pH exceeded 12.5, nor do they cite any authority (or result) from their statement that there is no showing that the corrosivity characteristic caused any injury to people or the environment.

Additionally, given the unrebutted testimony that the barrels had holes in them and were frail and rusty (Tr. at 125, 142-143), the District has carried its burden of showing that the waste was disposed so that it may have entered the environment. (415 ILCS 5/3.08 (1992).) The Ostros have not raised any argument that the activities at the property did not constitute a hazardous waste disposal site, beyond challenging that the pH result came from a barrel fragment and not from the yellow overpack. Thus, since we have found that the material in the overpack (which came from the partially and completely filled barrels) meets the regulatory definition of "hazardous", and since the Ostros have not rebutted the District's *prima facie* case, we find that the Ostros violated Section 21(f)(1) of the Act by conducting a hazardous waste disposal operation without a RCRA permit.

Section 21(m)

Section 21(m) of the Act provides that no person shall transfer interest in land which has been used as a hazardous waste disposal site without written notification to the Agency. (415 ILCS 5/21(m) (1992).) The District argues that the property was a hazardous waste disposal site because the material which tested at a pH level of 13 was disposed of on the property. Thus, the District concludes that by transferring the property to the District without first notifying the Agency, the Ostros violated Section 21(m).

The Ostros have not specifically challenged the District's allegations that their actions violated Section 21(m). Again, the Ostros did assert, in their motion for directed finding, that the District has not proven that the Ostros violated any statute or regulation. However, the Ostros have not provided any evidence, citation to the record, or legal argument in support of that assertion.

The Board finds that the District has presented sufficient evidence to establish a *prima facie* case. We found, in determining that the Ostros violated Section 21(f)(1), that the District has established that at least some of the material on the property was hazardous, and that the hazardous waste was disposed on the property. The Ostros have not presented any evidence challenging the allegation that the property was a hazardous waste disposal site, nor have they alleged that they notified the Agency before transferring the property to the District. Thus, we find that the Ostros violated Section 21(m) of the Act.

REMEDIES

The District asks the Board to enter an order directing the Ostros to remove all remaining hazardous substances from the property, conduct a comprehensive environmental analysis of the property, and undertake all necessary environmental remediation of the property. The District also requests that the Board assess civil penalties against the Ostros, and that the Board award the District the costs of its clean-up activities on the property.

In response to the District's requested remedies, the Ostros contend that no sanctions should be imposed against them because they made a good faith effort to dispose of the substances but were prevented from doing so by the District. The Ostros further contend that any order requiring them to clean up soil to levels articulated only in a generic clean-up objective for underground storage tank leaks would violate their constitutional due process rights. The Ostros also maintain that there is no evidence that the District cleaned up anything to support an award of clean-up costs, and that there is no legal authority for the Board to enter such an order. Finally, the Ostros assert that the Board should deny the remedies sought by the District because those remedies violate the Act's purpose of promoting conservation and encouraging recycling.

Remediation of Site

Initially, the Board notes that in its reply brief, the District states that it does not ask that the soil be remediated to a cleanup objective for underground storage tank leaks. Thus, we need not rule upon the Ostros' claim that utilizing those objectives would violate their due process rights.

The District asks that the Ostros be ordered to remove the stockpiled soil and remediate the excavation pit. In deciding whether to issue such an order, the Board must consider the factors delineated in Section 33(c) of the Act:

1. the character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people;

2. the social and economic value of the pollution source;

3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. any subsequent compliance.

(415 ILCS 5/33(c) (1992.)

After considering these factors, the Board finds that the Ostros must provide for further evaluation and remediation of the property. The record shows that twenty barrels, three of which still contained material, were placed in an unprotected area along a highway, without proper cover or liners. Those barrels deteriorated over a period of at least ten years, and at least some of the material in the barrels leaked onto the ground. The Ostros did not take any action to clean up the site until others had discovered the problem. The pollution source (the barrels) has no inherent social or economic value, and is unsuitable for this area. Although the record is not specific on the technical practicability and economic reasonableness of remediating the site, it is generally known that it is possible to remediate soils.

We order the Ostros to further investigate possible contamination of the stockpiled soil and the excavation pit. Depending upon the results of that investigation, the Ostros must perform necessary remediation. Both the investigation and remediation are to be done at the direction of, and with the approval of, the Agency. This includes, of course, obtaining any necessary permits. The District is directed to allow the Ostros and their contractors all necessary access to the property.

Clean up Costs

As to the Board's authority to order that the Ostros reimburse the District for its cleanup costs, we find that we have the authority to enter such an order. In People v. Fiorini (1991), 143 Ill.2d 318, 574 N.E.2d 612, the supreme court held

that although the award of cleanup costs is not expressly provided for in the Act, it would not hold that such an award would not be an available remedy for a violation of the Act under appropriate facts. The court stated that such a determination is properly left to the trial court's discretion. (Fiorini, 574 N.E.2d at 625.) While Fiorini involved a case brought in circuit court, the Board's authority is broader than the circuit court's authority to hear enforcement cases. (415 ILCS 5/31-5/33, 5/42, 5/45 (1992).) For example, a citizen (other than the Agency, Attorney General, or state's attorney) must first bring all enforcement actions before the Board. If we were to find that the circuit court had a remedy (award of clean up costs) which was not available before the Board, we would be finding that citizens have fewer remedies for violations of the Act. We also find that allowing the award of clean up costs in some cases will further the purposes of the Act, by encouraging persons to remediate a threat to the environment immediately, knowing that their costs could be reimbursed. Section 33(a) specifically allows the Board to enter such final orders as it deems appropriate. We find that this broad grant of authority, coupled with the supreme court's refusal in Fiorini to find that the award of cleanup costs is not available under the Act, gives the Board the authority to award cleanup costs. We believe that in deciding whether or not to award such costs, reference should be made to the factors set forth in Section 33(c) of the Act.

Having made those initial determinations, the Board finds that a further hearing is necessary in this case. We direct the hearing officer to schedule a hearing, to be completed no later than June 3, 1994, for evidence on the following issues:

1. The amount and reasonableness of costs incurred by the District in performing clean up at the property; and

2. Any other additional information necessary for the Board to award clean up costs and impose appropriate penalties, if the Board finds those awards necessary.

After the hearing is completed, the Board will enter its final order, awarding clean up costs and imposing penalties as we find appropriate.

This opinion constitutes the Board's findings of fact and conclusions of law as to the violations alleged in the District's complaint.

ORDER

The Board finds that Neil Ostro, Janet Ostro, and Big Foot Enterprises (collectively, the Ostros) violated Sections 21(a),

21(e), 21(f)(1), and 21(m) of the Environmental Protection Act (415 ILCS 5/21(a), 21(e), 21(f)(1), and 21(m) (1992)), by their activities on the property at the northwest corner of Sunshine Avenue and Route 45 in Lake Villa, Illinois. The Ostros are ordered to provide for further investigation, and any necessary remediation, of the stockpiled soil and the excavation pit on the property. That investigation and remediation must be done with the approval of the Illinois Environmental Protection Agency, including the securing of any necessary permits. The Lake County Forest Preserve District is ordered to allow the Ostros and their contractors all necessary access to the property. The Board also orders that further proceedings be held, consistent with the above opinion.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 31st day of March, 1994, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board