

ILLINOIS POLLUTION CONTROL BOARD
August 13, 1992

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	AC 91-31
v.)	Dockets A & B
)	(Administrative Citation)
RANDALL LOVELESS,)	(IEPA No. 305-91-AC)
)	
Respondent.)	

MR. JAMES G. RICHARDSON, ASSISTANT COUNSEL APPEARED ON BEHALF OF COMPLAINANT.

MR. BRENT CAIN, APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on an appeal of an Administrative Citation (AC) filed by the Illinois Environmental Protection Agency (Agency) pursuant to the Illinois Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1001 et seq.). The citation was filed June 24, 1991 and alleges that respondent Randall Loveless violated Sections 21(q)(1), (3), (4) and (5) of the Act¹ for causing or allowing open dumping of waste that resulted in litter, open burning, the deposition of waste in standing or flowing waters and the proliferation of disease vectors.

Respondent filed a petition for review with the Board on July 22, 1991. At a hearing held November 18, 1991 at the Macoupin County Courthouse, Carlinville, Illinois, Dale Elenberger testified on behalf of complainant and Randall Loveless testified in his own behalf. The Agency filed its post-hearing brief on December 11, 1991; the respondent on January 6, 1992. The Agency also filed a reply brief on January 13, 1992.

LEGAL FRAMEWORK

Section 21(a) of the Act sets forth a general prohibition against open dumping by providing that "[n]o person shall cause or allow the open dumping of any waste".

¹ Section 21 of the Act was amended by P.A. 87-752, effective January 1, 1992. As a result, subsections 21(p) and (q) of the Act were re-lettered, "21(o)" and "21(p)", respectively.

Section 21(q) of the Act provides that:

No person shall: ...

cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;
2. * * *
3. open burning;
4. deposition of waste in standing or flowing waters;
5. proliferation of disease vectors.

These sections of the Act establish that, in order to seek enforcement by way of the administrative citation process for violations of Section 21(q), the Agency must establish that the person caused or allowed open dumping resulting in litter, open burning or other specified conduct at the dump site. If the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and imposing the specified penalty unless, "... the person appealing the citation has shown that the violation resulted from uncontrollable circumstances". Section 31.1 (d) (2) of the Act.

PRELIMINARY ISSUES

Service of Process

Loveless objected at hearing to the service of this Administrative Citation and requested a continuance. Service was faulty, he argued, because the inspection report, routinely attached to the citation, was not served upon him. (Tr.5) Mr. Elenberger testified that it was (Tr.10-15); Mr. Loveless testified that it was not. (Tr.16-19) The hearing officer overruled the request, ruling that the evidence presented was insufficient to rebut the presumption of proper service as indicated by Elenberger's testimony and the affidavit of service. He also found that the fact that the matter was filed in June of 1991 showed that ample opportunity existed for the respondent to obtain the report, through discovery. (Tr.24) The hearing officer's ruling is affirmed. In addition to the points made by the hearing officer, the Board observes that the AC states, in a prominent position (page 1, paragraph , last sentence on the double-spaced page) that a "copy of the inspection report setting forth the results of such [April 23, 1991] inspection is attached hereto and made a part

hereof". (Resp. Exh. 1) The inspection report is a 22 page document² of which only 2 pages are a narrative description of the inspection. Half of the remaining pages are inspection photos, site sketches and maps and a quit claim deed, and the other half "summary of violation pages with check off spaces beside possible violations. Even if service of this document had not been made, the 40 minute continuance granted during the course of hearing (Resp. Brief p. 1), provided ample time for review of this document.

Offers of Proof

The respondent also submitted two offers of proof at hearing. The first concerned the issue of the Agency's practice of serving or not serving other area farmers with administrative citations for similar conduct. (Tr.57-60) The second involved subsequent remedial measures at the site. (Tr.75-79) We affirm the hearing officer's ruling that both types of evidence are irrelevant to the issue of whether Mr. Loveless caused or allowed any of the enumerated acts on the date alleged.

DISCUSSION

This matter began nearly two years ago. On August 23, 1990, Mr. S. Dale Elenberger, Agency field inspector, conducted an inspection of a site located in Brushy Mound Township, Macoupin County, Illinois. (Resp. Exh. 4) The site is a farming operation owned by respondent Randall Loveless and lies south of Carlinville, at approximately the intersection of County Road 1400 North and 1615 East. (Tr.28) During this inspection, Mr. Elenberger noted apparent violations of Sections 2(a), 21(d), and 21(q)(1) and (5) of the Act, which are respectively open dumping, operation of a waste disposal site without a permit, and operation of an open dump resulting in litter and in proliferation of disease vectors (flies were observed on dead cattle). These were communicated to Mr. Loveless in an administrative warning notice dated October 22, 1990. (Resp. Exh. 3, 4)

In November, 1990, after communication with Mr. Elenberger, Mr. Loveless wrote the Agency that he had "ceased all open dumping, open burning, and dumping in standing or flowing water at the site". (Resp. Exh. 5) He explained that much of the debris was the result of clean up operations after a severe storm in May, 1989; that the cattle carcasses were usually picked up by a rendering service but were disposed of by burial with six inches of cover if

²In numbering the exhibit with a number stamp the Agency did not number the third page contained in the exhibit, which appears to be a duplicate of page 000002.

not picked up within 24 hours during hot weather.³ Mr. Loveless explained that shingles and other debris had been hauled away, and that tires in excess of what the operation needed for holding tarps on bunker sites would be sent to a landfill, although some tires might also be stored in one of the feedlot sheds.

The site was inspected again on January 3, 1991; no written complaint was made as a result of this inspection. (Tr. 48) The site was again inspected on April 23, 1991. This inspection generated the administrative citation being contested here, alleging violations of Sections 21(q)(1), (3), (4) and 5 of the Act.

In testimony at hearing Elenberger stated that he observed a pit with water standing in it. The pit was located just west of County Road 1400 North. The inspection report describes it as roughly 54 feet by 51 feet in size. As described in Mr. Elenberger's testimony, and as portrayed in photographs taken during the inspection, tires, damaged lumber, plastic trash bags filled with unknown contents, roofing shingles and pieces of metal roofing material lined the sides of the pit and were in the standing water. None of the items were arranged in an orderly manner or were covered, he stated. (Tr.35) (Pet. Exh. 1, p. 16-20)

The respondent has a farming operation of nearly two thousand acres. (Tr. 83) The respondent characterized the vast majority of the observed material as waste which came from his own farm. (Tr. 87) He testified that the pit was man-made and is routinely used for disposing of waste. (Tr.88) Loveless testified that he does not provide daily cover for the wastes but covers it "weather and time permitting". To do otherwise would not be "cost effective". (Tr.83)

Loveless argues that the wastes observed are not "litter". (Respondent's Brief, pp. 2-3) "Litter" means any discarded used or unconsumed substance or waste and may include:

. . . any garbage, trash, refuse, debris, rubbish, grass clippings, or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. Ill. Rev. Stat. 1991, ch. 38, par. 86-3.

The Board has adopted this definition, found in the Litter Control Act, in St. Clair County v. Arthur Fields, AC 90-95, _____

³The disposal onsite of animal carcasses is not at issue in the present action.

PCB ____ (August 22, 1991). Respondent has presented no arguments which persuade the Board to reach a different result here. We find that the tires, lumber, trash bags and shingles discarded in Loveless' pit and the separate pile of charred shingles constitute "litter".

The respondent also contends that he is allowed to dispose of the waste generated by his own activities on-site. (Res.Br., p. 2) The Act states that no permit is required for any person conducting a waste storage, disposal or treatment operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where generated (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1021(d)(1)). Likewise a permit is not needed for the composting of landscape waste generated by such person's activities and disposed of on-site. Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022 (r). The Act also states that a person engaged in agricultural activity who is disposing of solid waste, acquired for use by that person on his own property, and disposed of on that property in accordance with the regulations or standards adopted by the Board, need not notify the Agency concerning the conduct of a waste-storage, waste-treatment or waste-disposal operation. Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1021 (d)(3).

Mr. Loveless is mistaken regarding the effect of these agricultural activity and on-site exemptions. Any on-site disposal practice must comply with Board regulations or standards. The lack of a permit for the activity or notice requirements are not at issue in this administrative citation. (emphasis added) No exception exists for the open dumping of any waste which results in litter, open burning or any other result enumerated in Section 21 (q) of the Act. The activities complained of are prohibited disposal practices by the terms of the Act and hence do not fall under the listed exemptions.

Respondent's testimony indicates that from time to time a cover is applied to the waste generated on-site. The respondent testified that he provides cover as weather and manpower allow. While we are cognizant that many farming operations have traditionally disposed of wastes in this manner, we are also aware that improper disposal practices constitute a threat to the environment. The evidence clearly shows that cover has not been applied to the waste for some time. A large amount of accumulated waste stands in the pit open to the elements. We also note that shingles were disposed some distance from the pit. While we are not addressing here the issue of whether the pit is subject to the daily cover requirements in the Board's landfill regulations, we find that the infrequency of cover has led to prohibited conditions.

Therefore, we conclude that Mr. Loveless violated Section 21(q)(1) of the Act relating to open dumping resulting in litter.

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Regarding the charge of open dumping resulting in waste deposition in standing water, Mr. Loveless has testified that the collected water at the bottom of his pit resulted from rainfall and was regularly pumped into a nearby lagoon. The lagoon is used to dispose of animal waste. (Tr. 77-78)

While not addressing the issue of whether Board regulations allow such pumpage, our review of the exhibits and record shows that this "pit" contained a substantial amount of standing water at the time of the April 23, 1991 inspection, as well as at the time of the initial inspection on August 23, 1990. The amount of water in the pit in April, 1991 indicates that it had not been pumped out recently.

Mr. Loveless does not contest the fact that there was waste and standing water in the pit. Mr. Loveless' arguments that there is little or no water in the pit at other times when seasonal conditions are warm and dry, that the pit does not supply any water source, that some of the waste could have been generated by a third party and that no tests had been performed to determine whether "contamination was occurring" (Resp. Brief 3) are not relevant to the questions presented to the Board in an administrative citation, which are 1) whether the alleged violations occurred, and 2) whether they were the result of uncontrollable circumstances. The actions of third parties are not "uncontrollable circumstances" for these purposes. Section 21(1)(4) does not require that the Agency prove that contamination of ground or surface water has resulted from the presence of litter in standing water; if contamination is proven, this results in another statutory violation (e.g. Section 12(a)), in addition to a Section 21(q)(4) violation. The Board finds that open dumping of wastes resulted in the deposition of wastes in standing waters in violation of Section 21(a)(4) of the Act.

Mr. Elenberger also testified that he examined an area south of the first area, approximately ten by fifteen feet in size, containing roofing shingles, which were stuck together. The shingles were charred and ashes were present on the ground. (Tr. 39-40)

Mr. Loveless testified that a roofing contractor had dumped the shingles there with his permission following a storm in 1989 which damaged the roof of the Loveless house. (Tr. 88) The purpose of the open burning was to rid the site of lumber scraps prior to burial. (Resp. Exh. 5) Respondent allowed this "unknowingly of the regulations." (Id.)

Based upon the testimony given on this point we find that the respondent caused or allowed open burning on his property. The respondent testified that a contractor placed the shingles at the spot that they were apparently burned. The Act forbids open dumping resulting in open burning. Open dumping is clearly shown

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to have taken place; open burning was the result. Therefore, we find that respondent violated Section 21(q)(3) of the Act.

Finally, Mr. Elenberger inspected an area northwest of the pit. The area contained earthen berms which held a large pile of tires, he stated. The dimensions of this tire pile approximated twenty seven feet long by seventy feet wide by fifteen feet high. (Tr. 42) The tires were uncovered. Elenberger testified that he observed water standing in the tires and adult mosquitoes flying about them. He also observed mosquito larvae in some of the tires. (Tr. 43) Mr. Elenberger stated that during his inspection he talked to the respondent. The respondent stated that the tires were going to Pana, Illinois but that the people who were to take them were going to charge him to do so. (Tr. 46) Upon examination by Mr. Richardson, respondent testified that the tires came from his operations and also from area filling stations. (Tr.91)

The respondent testified he uses the tires in farm operations. He covers livestock feed with polyurethane sheets. The tires, he stated, are used to keep the sheets from blowing. If the silos were full, he stated, he would need all the tires that he has. (Tr. 80) In his written letter response to the Agency's administrative warning notice (Resp. Exh. 5), Mr. Loveless stated he did not believe he would need all the tires for tarps, but might store some in his sheds or haul them away. (Id.)

We conclude that respondent has violated the Act by causing or allowing the open dumping of tires which resulted in the proliferation of disease vectors. A tire pile of the dimensions found contains hundreds of tires. The manner in which these tires are stored on site violates the prohibitions contained in the Act and in Board regulations. The tires are uncovered, contain water and have produced a breeding ground for mosquitoes. In our opinion in R88-24 Managing Scrap Tires Accumulations for the Control of Mosquitoes (April 27, 1989), we anticipated the use of tires in the manner Mr. Loveless described, but we concluded, however, that proper use requires altering the tires to prevent accumulation of water by such means as longitudinal slitting and stacking. (Opinion, p. 23) We also note that these tires exceed 20 in number, the number of unaltered tires exempted from the management standards of Section 55(a)(3) of the Act for like farm operations. Therefore, we find that respondent has violated Section 21(q)(5) of the Act.

Finally, as discussed above, we do not find that any of the proven violations result from uncontrollable circumstances. Therefore, we find that Mr. Loveless has violated Section 21(q)(1), (q)(3), (q)(4) and (q)(5) of the Act.

PENALTIES

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Penalties in administrative citation actions of the type here brought are proscribed 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 (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. 1991, ch. 111 1/2, par. 1042
(b)(4).

Respondent will therefore be ordered to pay a civil penalty of \$2,000 based on the violations as herein found. For purpose 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 statement of costs, supported by affidavit, with the Board and with service upon Mr. Loveless. 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.

Finally, the Board notes Loveless' arguments that the Agency "gives farmers no guidelines as to what they expect them to do and, in this case, there is no indicia that the Respondent was warned, nor given any guidelines as to what to do with said warning". Noting that the Agency first agreed, but then reconsidered and declined, to meet with Loveless' counsel on the site after issuance of the citation, Loveless charges that the Agency "is more concerned about getting its...penalty than any other matter". (Resp. Brief 4)

The record clearly indicates that Loveless received Agency guidance concerning violations and their correction after the first site inspection. Violations persisted through reinspections in January and April, 1991. Once this citation was filed, the Agency had no duty to provide additional onsite "guidance". The penalty

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in this matter has been pursued and imposed as the statute requires.

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 April 23, 1991, of Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 1021(q) (1), (q) (3), (q) (4) and 1021(q) (5).
2. Within 45 days of this order Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$2,000 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

Illinois Environmental Protection Agency
Fiscal Service Division
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62706

Respondent shall include the remittance form and write the case name and number and their social security or federal Employer Identification Number on the Certified check or money order.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. 1991, ch. 120, par. 10-1003), as now or hereafter amended, from the date of payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

3. Docket A in this matter is hereby closed.
4. Within 30 days of this order, the Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Randall Loveless. 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 Randall Loveless. 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 paragraph 4

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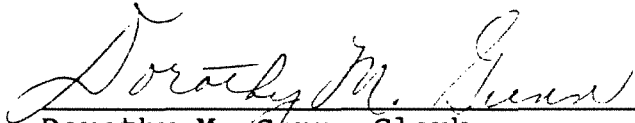
of this order within 45 days of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111 1/2, 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. (But see also 35 Ill. Adm. Code 101.246, Motion for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

IT IS SO ORDERED.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 13th day of August, 1992, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board