ILLINOIS POLLUTION CONTROL BOARD
January 10, 1991

COUNTY OF JACKSON,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 89-258
	)	Docket A & B
	)	(Administrative Citation)
DONALD TAYLOR,	)	
	)	
Respondent.	)	

MR. W. CHARLES GRACE, STATE'S ATTORNEY, APPEARED ON BEHALF OF COMPLAINANT COUNTY OF JACKSON

MR. DONALD TAYLOR APPEARED PRO SE ON BEHALF OF RESPONDENT

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on an Administrative Citation filed pursuant to authority vested in the Illinois Environmental Protection Agency and delegated to the County of Jackson pursuant to Section 4(r) of the Illinois Environmental Protection Act (hereinafter "the Act") (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1001 et. seq.). The citation was filed November 20, 1989, and alleges that Respondent, Donald Taylor, the operator of a facility located in Jackson County, Illinois is in violation of Sections 21(q)(1) and 21(q)(3) for causing or allowing open dumping of wastes that result in litter and result in open burning.

A Petition for Review was filed with the Board on December 21, 1989. Hearing was held February 23, 1990, at the City Council Chambers in Murphysboro, Illinois. Mr. George Browning testified for the County; Mr. Donald Taylor testified for Respondent. No briefs were filed.

DISCUSSION

Section 31.1 of the Act provides that "[t]he prohibitions specified in subsections (p) and (q) of Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in this Act." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031.1.) Section 21(p) of the Act applies to sanitary landfills permitted under the Act while Section 21(q) applies to all dump sites. The administrative citation issued against Mr. Taylor alleges violation of subsection (1) and (3) of Section 21(q). Section 21(q) provides that no person shall in violation of Section 21(a) of the Act:

> 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;
>
> * * *
>
> 3. open burning;

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.

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 County must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted 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 impose 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. Therefore, the initial inquiry in this case is whether Mr. Taylor's conduct constitutes causing or allowing "open dumping."

Section 3.24 of the Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.24.) Section 3.31 of the Act defines "refuse" as "waste." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.31.) Section 3.53 defines "waste" as, inter alia, "garbage ... or other discarded material ... ." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.53.)

At hearing complainant's witness, Mr. Browning, testified regarding a site inspection he made of Mr. Taylor's facility on September 22, 1989. Mr. Browning also provided several photographs of the site inspection which were introduced as exhibits. The inspection was made in response to a citizen complaint. During the inspection Mr. Browning observed a pile of debris approximately four yards by five yards in size. The debris included vinyl siding and cardboard. While there was no open flame during the inspection, the pile of debris was still smoldering, smoke was rising from the pile, and it showed signs of burning, including the ground underneath the pile being scorched. (R. 10-15; Pet. Exs. 1-4).

During the inspection Mr. Browning also observed a second pile of debris approximately fifteen yards by ten yards by three

yards in size. The debris included asphalt shingles, building materials, wood, some metal, household garbage, cardboard boxes, and plastic material. This pile was located on an embankment of the Big Muddy River. While there was a trailer with a metal exterior and a wooden building with old weathered shingling material located at the site, the vinyl siding and asphalt roofing did not come from these buildings. (R. 10-16; Pet. Ex. 1-4). Mr. Taylor admits that Mr. Browning's testimony was accurate (R. 31). Mr. Taylor stated that the only material to come from the buildings on site was some of the metal and some of the paper. (R. 31-32).

On February 14, 1990, just prior to the hearing in this matter, Mr. Browning re-inspected the site. The piles of debris appeared to be unchanged from the original inspection (R. 21-22; Pet. Ex. 7).

Based on the evidence presented, the Board concludes Complainant has demonstrated that open dumping, which resulted both in litter and in open burning, has occurred on the Respondent's property. The Board must now consider whether Mr. Taylor caused or allowed such open dumping.

Mr. Taylor admits that he has an ownership interest in the land (R. 25-26), and that he was responsible for dumping some of the material on the land (R. 31-32). But, he denies starting the fire and denies the majority of the dumping. Mr. Taylor does not know who did the dumping. (R. 27-32).

The Board has previously considered many cases interpreting the "cause or allow" language. In one of the early cases the Board specifically addressed the claim of the respondent that he did not specifically allow the activity, as well as reviewing earlier Board holdings on the issue. In IEPA v. A.J. Welin, PCB 80-125, May 13, 1982, at pages 5-6, the Board stated:

> The evidence provided by the Agency and Welin's witnesses established that foundry sand, sand cores and construction material are present at the Respondent's site. These types of materials constitute solid waste pursuant to Chapter 7 definitions. Pursuant to Rules 201 and 202 of this same Chapter, development and operating permits are required when solid wastes are deposited at a site, as they were in this case. EPA v. Rafacz Landscaping and Sod Farms, Inc., PCB 72-196, 6 PCB 31 (October 24, 1972). Moreover, the "cause or allow" language of Rules 201 and 202(a) of Chapter 7 precludes the argument that the materials were brought upon Welin's property without his permission and that no permit is, therefore,

needed. The Board has repeatedly held that it is the responsibility of the landowner to insure that his land is being used properly and is not subject to nuisance dumping. EPA v. Dobbeke et al., PCB 72-130, 5 PCB 219 (August 22, 1972); EPA v. Village of Karnak, PCB 74-381, 16 PCB 13 (March 6, 1975); EPA v. Maney et al., PCB 79-262, 39 PCB 363 (August 31, 1980).

Section 21(a) of the Act reads: "No person shall...cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board." The Respondent has testified that he never permitted anyone to dump. However, the photographs and the testimony of numerous Agency witnesses clearly establish that refuse has been dumped on a massive scale which involved the use of heavy equipment. The Agency has offered no evidence that the Respondent, who travelled frequently and was usually away from the site, actively permitted open dumping or that he actually caused the dumping. However, the Board has previously held that "allow" includes inaction on the part of the landowner. The Board finds that the Respondent's passive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. EPA v. Dobbeke et al., PCB 72-130, 5 PCB 219 (August 22, 1972).

Assuming good faith on the part of Welin and total lack of knowledge about any dumping activities, he is still liable for violations of the Act. EPA v. Village of Port Byron, PCB 72-67, 6 PCB 9 (October 24, 1972); Meadowlark Farms Inc., v. Illinois Pollution Control Board, 17 Ill. App. 3d 851, 308 N.E.2d 829, at 836 (1974); Bath, Inc. v. Illinois Pollution Control Board, 17 Ill. App. 3d 507, 294 N.E.2d 778 (1973). Although the Respondent has claimed that there has been no indication of regular dumping activities at the site, the evidence indicates otherwise. The Respondent's own witness, James F. Cordray, has even admitted dumping cement, dirt, and excavating materials at the site during the time period of the Complaint. (R. 405-406). Additionally, there is no question that the site did not have requisite permits, thereby violating Section 21(d) [previously Section

21(e)] of the Act.

The meaning of the phrase "cause or allow", as used in Section 12(a) of the Act, has been determined by the Illinois Appellate Court, Third District, in Freeman Coal Mining Corp. v. Illinois Pollution Control Board, 21 Ill. App. 3d 157, 313, N.E.2d 616 (1974). In Freeman, the petitioner was an owner of a coal mine that maintained a mine refuse pile. Rainfall upon the pile resulted in an acidic contaminant which washed into an unnamed waterway causing water pollution. Id. at 618. The petitioner argued that it could not be held liable for "allowing such discharges because the discharges were the result of a natural force beyond the control of the petitioner" Id. at 619. In its decision in Freeman, the court restated that the Act is malum prohibitum and no proof of guilty knowledge or mens rea is necessary to a finding of guilt. The court went on to say, that the fact that the discharges were unintentional, or occurred despite efforts to prevent them, is not a defense. The owner of the property that creates the pollution has a duty, imposed by the legislation, to take all prudent measures to prevent the pollution. The efforts by the landowner to control or treat the pollution go to the issue of mitigation, not to the primary issue of liability. Id. at 621.

In Bath, Inc. v. IPCB, 10 Ill. App. 3d 507, 294 N.E.2d 778 (1973), the Fourth District was faced with the issue of whether respondents had caused or allowed burning at page 781:

> On the issue of the finding as to the existence of underground burning, the petitioners assert that neither they or other witnesses knew the cause of the underground burning, and implicit in their argument is that a violation cannot be predicated upon the existence of burning in the absence of a finding that the petitioners by their affirmative act caused, or intended, the burning. This argument is not persuasive. The rule prohibits burning except in an approved incinerator and the balance of the rules relate to a handling of the refuse in the landfill so as to eliminate burning. It is not an element of a violation of the rule that the burning was knowing or intentional. We hold that knowledge, intent or scienter is not an element of the case to be established by the Environmental Protection Agency at the hearing before the Pollution Control Board upon the issue of burning. In this connection, see 46 A.L.R.3d 758, and the cases there collected.

A more detailed explanation of the rationale was provided by the Fifth District in a subsequent case involving "cause or allow" in regard to water pollution. In Meadowlark Farms v. IPCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (1974), the Court stated at pp. 836-837:

> Petitioner further argues that it has not caused, threatened or allowed the discharge of contaminants within the meaning of section 12(a) of the Act (Ill. Rev. Stats. 1971, ch. 111 1/2 1012(a)). Petitioner contends that its mere ownership of the surface estate from which the discharge originates is the only relationship to the transaction responsible for the discharge and that to except the petitioner to exercise control to prevent pollution would be unreasonable. In conjunction, the petitioner states that its lack of knowledge that the discharge of contaminants was occurring is a defense to the complaint. We find these arguments without merit. To clarify this issue, it should be noted that the petitioner was charged with causing or allowing the discharge of contaminants so as to cause or tend to cause water pollution in Brushy Creek and tributary in violation of Section 12(a) of the Environmental Protection Act and certain rules of SWB-14 of the Sanitary Water Board's rules and regulations. Petitioner was not charged with creating the refuse piles or with responsibility for the operation of the Peabody 43 mine which resulted in the creation of the refuse pile. The Pollution Control Board merely found that the petitioner had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property and that fish were killed, and that the petitioner had the capability of controlling the pollutional discharge. Therefore, petitioner was found to have violated section 12(a) of the Act, as well as violating the other rules and regulations related to water pollution. The findings of the Board were correct.
>
> We have found that the petitioner was the owner of the refuse piles which were the source of the pollutional discharge, but to see how the petitioner violated the Act, we

must look to the Act itself. Section 12(a), which petitioner was found guilty of violating, states that:

> "No person shall: (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act; * * *"

Petitioner admits that seepage from the refuse pile containing AMD had created a flow in the tributary of Brush Creek and that the fish died as a result of the AMD seepage. Furthermore, soon after the petitioner was given notice of its violation, Amax Coal Co., a division of the petitioner's parent company, investigated the charges and began an abatement program. The unquestioned pollution proves sufficiently that the petitioner allowed the discharge within the meaning of section 12(a).

Petitioner's so-called lack of knowledge that the discharge existed provides no defense. The Environmental Protection Act is malum prohibitum, no proof of guilty knowledge or mens rea is necessary to a finding of guilt. In Bath, Inc. v. Pollution Control Board (1973), 10 Ill. App. 3d 507, 284 N.E.2d 778, the Fourth District Appellate Court was faced with this precise issue with regard to air pollution. Bath, Inc. the owner of a landfill, was found in violation of certain rules and regulations dealing with landfills, was fined $2000, and ordered to stop underground burning in violation of the Refuse Disposal Law (Ill. Rev. Stat. 1967, ch. 111 1/2, [Sections] 471-476). Under section 49(a) [Sic] of the Environmental Protection Act (Ill. Rev. Stat. 1971, ch. 111 1/2 1049(c) the Refuse Disposal Law remained in effect. The defendant Bath asserted that it had no knowledge of the cause of the burning and argued that a violation could not be predicated upon the existence of burning in

> the absence of a finding that the defendant by its affirmative act caused or intended the burning. The rule which was violated prohibited burning except in an approved incinerator. That court found that it was not an element of the violation that burning was knowing or intentional, and therefore held that knowledge, intent or scienter was not an element of the case to be established by the E.P.A. at a hearing before the Pollution Control Board upon the issue of burning. This rule has also been applied in other jurisdictions with regard to water pollution. (State v. Kinsley (Gloucester County Ct. 1968), 103 N. J. Super. 190, 246 A. 2d 764, aff'd (Super. Ct. 1969), 105 N. J. Super. 347, 252 A. 2d 224.) We feel that the same reasoning applies here; that knowledge is not an element of a violation of section 12(a) and lack of knowledge is no defense.

More recently, this theory was reiterated by the Third District in Perkinson v. IPCB, 187 Ill. App. 3d 689, 546 N.E.2d 901 (1989) at 336:

> In Hindman v. Environmental Protection Agency (5th Dist. 1976) 42 Ill. App. 3d 766, 1 Ill. Dec. 481, 356 N.E.2d 669, the operator of landfill site was held accountable for a fire that was not started by either the operator or his employees. The court relied upon the Meadowlark Farms case and upon Bath, Inc. v. Pollution Control Board (4th Dist. 1973) 10 Ill. App. 3d 507, 294 N.E.2d 778, and ruled that a violation is not predicated upon proof of guilty knowledge or intentional harm. In the Bath case, the owner of a landfill was held to be responsible for underground burning even though the cause was unknown and not the result of the owner's affirmative act.
>
> The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts established the owner either lacked the capability to control the source, as in Phillips Petroleum or had undertaken extensive precautions to prevent vandalism or other intervening causes,

> as in Union Petroleum. Here Perkinson plainly had control of the lagoons and the land where the pollution discharge occurred. The PCB concluded that he is liable for the pollution that had its source on his land and in a waste facility under his control. Under well-established Illinois law, that is sufficient to support a finding of a violation of the Environmental Protection Act.

Based on the facts presented in this case and the legal principles outlined by this Board and the Courts, we conclude that Mr. Taylor did "cause or allow" the open dumping described in this proceeding. When asked if he took any measures to keep people out, he stated that he could not put a gate across the road because it was used by other residents (R. 31). He made no mention of fencing the property or posting "no dumping" signs. The debris he placed on the property, may in fact have encouraged others to dump there. The Board cannot conclude that the open dumping was due to uncontrollable circumstances. Therefore Mr. Taylor is in violation of Section 21(q)(1) and (3).

The final question the Board must consider is whether Mr. Taylor has shown that the violations resulted from uncontrollable circumstances. This is the only showing provided in the statute that allows the Board to excuse any violation. If the Board so finds, then no violation would be found and no penalty imposed (see Section 31.1(d)(2) of the Act).

Mr. Taylor testified that he tended to the property, had last lived on the property two years earlier, and had first become aware of the dumping two weeks to a month before Mr. Browning's inspection. (R. 29,30). He did not know who was doing it, but acknowledged that some of the "trash" or "garbage", but not the shingles, came from the inside of an old house on the property that he and his brother were tearing down over the last two years. (R. 27,32). When asked by the hearing officer if he took any measures to "put up a gate or anything" (R. 30,31) to keep people out, Mr. Taylor stated only that he could not put a gate across the road because it was used by other residents. (R. 31).

Mr. Taylor's testimony is insufficient to support a claim of uncontrollable circumstances (See e. g. In the Matter of; Dan Heusinkved, County Clerk, County of Whiteside, State of Illinois, AC 87-25, (85-247-254), (January 21, 1988); In the Matter of; Village of Rantoul; AC87-100, (92-539-547), (September 22, 1988)). Even if we were to accept the inability to put a gate across the road, there is nothing in the record explaining why no other actions could have been taken--why placing "no dumping" signs, screening, fencing, or taking any other measures designed to restrict or discourage access were beyond Mr. Taylor's

control. The Board finds that the violations did not result from uncontrollable circumstances.

PENALTIES

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 (p) 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.
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> Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of $1,000 based on the two 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 County. The Clerk of the Board and the County will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Donald Taylor. 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 22, 1989 of Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1021(q)(1) and 1021(q)(3).

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

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

3. Within 45 days of this Order, Respondent shall, by certified check or money order, pay a civil penalty in the amount of $500 payable to the Jackson County Treasurer Fund. Such payment shall be sent to:

   Shirley Booker
   Jackson County Treasurer
   Jackson County Courthouse
   Murphysboro, IL 62966

4. Docket A in this matter is hereby closed.

5. Within 30 days of this Order, Jackson County shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Donald Taylor. 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 Donald Taylor. Such filings shall be entered in Docket B of this matter.

6. Respondent is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, 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.

Board Member J.D. Dumelle abstained.

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 10th day of January, 1991, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board