

ILLINOIS POLLUTION CONTROL BOARD
February 6, 2003

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 02-21
)	(RCRA Enforcement)
J & F HAULING, INC.,)	
)	
Respondent.)	

INTERIM OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

The People of the State of Illinois (complainant) filed a seven-count complaint against J & F Hauling, Inc. (J&F). The allegations included the open dumping of used and waste tires, conducting a waste disposal operation without a permit, and failure to make a hazardous waste determination. The complainant moved for summary judgment, which the Board granted on all counts. The matter continued to a hearing on the issues of remedy and reimbursement of costs and attorney fees, which the Board now addresses. In this interim opinion, the Board provides a brief procedural history of the case; the statutory background for civil penalties, costs, and attorney fees; a summary of the pertinent facts; and a discussion showing the Board's reasoning.

PROCEDURAL HISTORY

The complainant's seven-count complaint alleged (1) open dumping of waste; (2) causing or allowing litter; (3) open dumping of used and waste tires; (4) conducting a waste disposal operation without a permit; (5) waste disposal at an improper site; (6) failure to make a special waste determination; and (7) failure to make a hazardous waste determination. People v. J & F Hauling, Inc., PCB 02-21, slip op. at 6-8 (June 6, 2002). The complainant alleged that these violations of the Environmental Protection Act and the Illinois Administrative Code occurred at J&F's demolition and waste hauling business located at 7753 West 47th Street, McCook, Cook County (the Site).¹ Comp. at 2.

The complainant then filed a motion to deem facts admitted and for summary judgment. J & F Hauling, PCB 02-21, slip op. at 1. This motion was withdrawn, but the complainant filed a second motion to deem facts admitted and for summary judgment. J & F Hauling, PCB 02-21, slip op. at 1. The Board subsequently granted the complainant's motion for summary judgment on all seven counts. J & F Hauling, PCB 02-21, slip op. at 8-9. Specifically, the Board found that J&F violated Sections 21(a), (d)(1) and (2), (e), and (p)(1); and 55(a) of the Act (415 ILCS

¹ The Board will cite the complainant's complaint as "Comp. at ___." The complainant's post-hearing brief will be cited as "Comp. Br. at ___." The transcript of the Board's October 2, 2002 hearing will be cited as "Tr. at ___." Exhibits accepted as evidence at the Board's hearing will be cited as "Comp. Exh. ___."

5/21(a),(d)(1) and (2), (e), (p)(1), and 55 (a) (2002)) and 35 Ill. Adm. Code 722.11, 808.121, and 812.101(a).

Subsequently, the Board held a hearing on the specific issue of remedy and reimbursement of costs and attorney fees. The parties were notified of the hearing by the hearing officer and by publication in the *Chicago Sun-Times*. J&F did not appear at the hearing. Tr. at 5. The complainant filed a post-hearing brief on November 18, 2002. J&F failed to file a post-hearing brief.

STATUTORY BACKGROUND

Section 33(c) of the Act states: “In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) 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;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance.” 415 ILCS 5/33(c) (2002).

According to Section 42(h) of the Act, in determining the appropriate civil penalty, the Board considers any matters of record in mitigation or aggravation of penalty, including “the following factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the violator because of delay in compliance with requirements;
- (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary

compliance with this Act by the violator and other persons similarly subject to the Act; and

- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.” 415 ILCS 5/42(h) (2002).

Furthermore, Section 42(f) provides: “the Board . . . may award costs and reasonable attorney’s fees, including the reasonable costs of expert witnesses and consultants, to the State’s Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act.” 415 ILCS 5/42(f) (2002).

FACTS

In the Board’s June 6, 2002 order in this case, the Board determined that J&F admitted material allegations including:

1. J&F is an Illinois corporation, and, at all times relevant to the complaint, operated a demolition and waste hauling business on property commonly known as 7753 West 47th Street, McCook, Cook County.
2. On July 7, 1999, the Agency inspected the site. During the inspection, the inspector found that:
 - A. A pile of mixed construction and demolition debris and other waste was located on the east side of the site. The pile measured approximately 20 feet high by 150 feet long.
 - B. A pile of worn and damaged tires, not mounted on vehicle rims was located on the south side of the site.
 - C. Piles of scrap metal piping and wires were dumped in the center of the site.
 - D. A large pile of scrap wood, scrap metal, and scrap vinyl siding was located on the west border of the site.
 - E. A darkly stained area of soil was located on the northern border of the site. The inspector believed this stained area to be a result of spilled or leaked used oil.
3. From May 23, 2000 to August 17, 2001, a new accumulation of construction and demolition debris was deposited at the northern end of the site.

4. On June 21, 2001, an Agency inspector visited the site and discovered that the tires had been removed, but that other accumulations remained on the site.
5. At all times relevant to the complaint, the site was not permitted by the Agency for disposal of waste.
6. From June 7, 1999, until May 23, 2000, J&F did not apply to the Agency for or obtain a permit to conduct a waste disposal operation at the site.
7. From June 7, 1999, until August 17, 2001, J&F did not apply to the Agency for or obtain a permit to conduct a waste disposal operation at the site.
8. J&F spilled or leaked used oil on the ground at the site.
9. From July 7, 1999, to the June 6, 2002, J&F generated solid waste without making a hazardous waste determination. J&F, PCB 02-21, slip op. at 2-3.

The Board granted summary judgment to the complainant on each count of its complaint. J&F, PCB 02-21, slip op. at 8-9. The matter proceeded to hearing on civil penalties, costs, and attorney fees. The complainant called one witness, Anna Van Orden, an inspector for the Illinois Environmental Protection Agency (Agency). Tr. at 9-28.

Ms. Van Orden testified she first inspected the site on June 7, 1999, to investigate a citizen complaint. Tr. at 13, 15. Ms. Van Orden notified the owner of the facility, Jim Fergelic, that he needed to obtain a waste permit for the activities at the site, remove debris from an open waste pile, and analyze and remove stained ground on the Site. Tr. at 14-15. The open waste pile was about 120 feet long, 20 feet wide, and 20 feet high. Tr. at 17. The pile consisted of at least 1,700 cubic yards of construction demolition debris. *Id.* On top of the pile were about 20 to 30 used tires. Tr. at 18. Ms. Van Orden testified that this pile was about 200 feet from a residential area. Tr. at 12-13. After Ms. Van Orden notified J&F to obtain a waste permit, J&F submitted a form, but it was incomplete. Tr. at 19. J&F never resubmitted the form and never obtained a permit. Tr. at 19-20. After the inspection, the Agency issued a violation notice to J&F. Tr. at 20.

On May 23, 2000, Ms. Van Orden visited J&F again. *Id.* After observing the Site, Ms. Van Orden found no evidence that the open waste pile had been altered. Tr. at 21. Rather than a reduction in demolition waste on the Site, Ms. Van Orden observed additional waste piles. Tr. at 22.

Ms. Van Orden returned to the Site on June 19, 2001. *Id.* Again, she observed that the waste had not been removed. Tr. at 22-23. It was not until January 2002, that Ms. Van Orden observed removal of any waste. Tr. at 23. Her investigation revealed that some of the waste had been removed to the Congress landfill in Hillside, Illinois. *Id.* Upon her visit to the Site on

August 27, 2002, Ms. Van Orden observed that the used tires had finally been removed from the construction demolition waste pile. Tr. at 25. Ms. Van Orden specifically talked to J&F about removing the waste tires because of concern about mosquito breeding and the spread of the West Nile virus. Tr. at 25. By September 24, 2002, about half of the waste still remained on the Site as did the stained soil. Tr. at 26-7. No sampling of the soil was ever performed. *Id.* Ms. Van Orden testified that J&F removed more waste when their workload was modest, but waste removal slowed when J&F resumed regular operations in the spring and summer of 2002. Tr. at 24.

At the close of Ms. Van Orden's testimony, the Hearing Officer admitted into evidence a consent order between the People of the State of Illinois and J&F entered on July 17, 1997, and a second consent order between the People of the State of Illinois and J&F entered on October 7, 1999. Tr. at 30. J&F agreed to pay a \$12,000 penalty according to the July 17, 1997 consent order and a \$15,000 penalty according to the October 7, 1999 consent order. Tr. Exh. E, F. The consent orders showed separate enforcement actions for violations of the Act. Tr. at 30.

DISCUSSION

The Board now determines the appropriate remedy for J&F's violations of the Act. The complainant requests that the Board levy a civil penalty. Comp. Br. at 1. In addition, the complainant requests the Board to order J&F to remove all construction demolition debris and other waste from the Site and to order J&F to cease and desist from future violations of the Act. Comp. Br. at 1-2. The complainant also seeks reimbursement of costs and attorney fees. Comp. Br. at 2.

Remedies

In determining what remedy is appropriate, the Board considers all facts and circumstances of record that bear upon the reasonableness of J&F's violations of the Act. 415 ILCS 5/33(c) (2002).

Section 33(c)

Section 33(c) lists five factors, which the Board considers in making orders and determinations. First, the facts and circumstances of this case show that the open dumping of waste including used tires interfered with the general welfare of the residents within 200 feet of the Site. The waste tires provided a breeding ground for mosquitos, which could have carried the West Nile virus. *See* 415 ILCS 5/33(c)(i) (2002). Second, there is no evidence in the record showing that the open dumping of waste, including used tires, had a social or economic value. *See* 415 ILCS 5/33(c)(ii) (2002). Third, the open dumping of waste was not suitable to the area. The evidence indicates that a residential area was within 200 feet of the pollution source. *See* 415 ILCS 5/33(c)(iii) (2002). Fourth, reducing or eliminating the waste and used tires was not an economically unreasonable burden. J&F is in the business of hauling waste; since J&F brought the waste to the site, J&F could have properly removed the waste as well. Furthermore, the evidence does not show any technical impracticability prohibiting elimination of the waste and used tires. In fact, the evidence shows that J&F was able to dispose of about half of the

waste at the Congress landfill in Hillside. *See* 415 ILCS 5/33(c)(iv) (2002). Finally, J&F did not subsequently comply with the Act. The Agency notified J&F that it needed to obtain proper permits, but J&F failed to do so. The Agency gave J&F violation notices, but J&F failed to clean up the waste on its property to any degree for over two years. 415 ILCS 5/33(c)(v) (2002).

The complainant's evidence provided at the Board's hearing is uncontested. J&F has failed to provide any evidence at the Board's hearing and has failed to file a post-hearing brief. Application of the uncontested facts in this case to the five Section 33(c) factors allows for a single conclusion: J&F's violations of the Act were unreasonable.

Other than a civil penalty, the complainant seeks three other remedies. First, the complainant requests that the Board order J&F to remove all accumulated waste from the Site and dispose of the waste at a properly permitted location. Second, the complainant requests the Board to order J&F to determine the identity of the stained soil at the Site and perform any necessary remediation. Third, the complainant requests the Board to order for J&F to cease and desist from any further violations of the Act and Board regulations. Comp. Br 10-11.

The record reveals that J&F has removed about half of the original 1,700 cubic yards of waste. The Agency indicated that the waste was sent to the Congress landfill in Hillside. J&F has failed to indicate why the remaining waste has not been removed. Additionally, J&F has not provided any reason explaining why the stained soil was not identified or remediated as necessary. At best, J&F's conduct shows a lack of due diligence; at worst, J&F's conduct suggests an intentional disregard for the provisions of the Act and Board regulations. The complainant requests that the remaining waste be removed within nine months of the Board's order in this matter. Comp. Br. at 10. The Board finds that the complainant's requests for waste removal and soil remediation are reasonable.

The Board also finds that J&F must conduct a special waste and hazardous waste determination of the stained soil and provide the results of that determination to the Agency within 45 days of the Board's final order and opinion.² In addition, the Board finds that J&F must cease and desist from further violation of the Act and Board regulations.

Furthermore, after considering the Section 33(c) factors, the Board finds that a civil penalty is proper in this instance. To determine the proper penalty, the Board considers factors listed in Section 42(h) of the Act.

Section 42(h)

² The complainant has not requested a specific timeline for completion of the special waste and hazardous waste determinations. However, a survey of Board regulations addressing reporting early action taken regarding release of petroleum at underground storage tanks (35 Ill. Adm. Code 732.202(d) and (e)) and reporting confirmed increases in groundwater pollution at landfills (35 Ill. Adm. Code 811.319(a)(4)(B)) reveals that a 45-day period for conducting the determinations and reporting the results to the Agency is appropriate.

In determining the appropriate civil penalty, the Board considers any matters of record in mitigation or aggravation of penalty. 415 ILCS 42(h) (2002). The Board's determination is aided by the five factors listed in Section 42(h) of the Act. The complainant's argument addressed four of the Section 42(h) factors: duration and gravity of violations; diligence in attempting to comply; penalty amount that will deter further violations and aid in enhancing voluntary compliance; and deterrence and previous adjudications. We consider these four factors, plus the one factor not addressed by the complainant; economic benefit.

Duration and Gravity of Violations. J&F's violations continued from July 7, 1999, until January 2002. Although the amount of waste was reduced in January 2002, the violations were not completely corrected. In fact, the evidence shows that all violations (except for count (iii)'s allegation of open dumping of used and waste tires) continued at least until September 2002. The gravity of the violations is enhanced by the site's close proximity to a residential area. Ultimately, the full gravity of J&F's violations is unmeasured because J&F has at all times failed to conduct a special waste or hazardous waste determination. The Board weighs this factor in favor of aggravation of the civil penalty.

Diligence in Attempting to Comply. J&F did not show due diligence. J&F's violations continued for over two years after the Agency first served J&F with a violation notice. After receiving the violation notice, J&F did nothing to address the alleged infractions of the Act and the Board's regulations. Although J&F eventually removed some of the open waste, at least 800 cubic yards remain. J&F has failed to address the area of stained soil observed by the Agency on July 7, 1999. Consequently, the Board weighs this factor in favor of aggravation of the civil penalty.

Economic Benefit from Delay in Compliance. J&F delayed its effort to comply with the Act and Board regulations during the spring and summer of 2002 by slowing its effort to remove waste from the Site. This delay provided an economic benefit to J&F because J&F devoted its equipment to demolition and hauling operations, which provided income, rather than waste removal, which did not provide income. The Board weighs this factor in favor of aggravation of the civil penalty.

Penalty Amount that will Deter Further Violations and Aid in Enhancing Voluntary Compliance. J&F has entered two consent orders in the last six years with the complainant regarding separate enforcement actions for violations of the Act regarding J&F's construction demolition and waste hauling business. The penalties associated with those consent orders total \$27,000. J&F's current violations extending over a span of at least two years persisted despite the past consent agreements. The complainant contends that the penalties levied in the consent agreements did not aid in enhancing voluntary compliance. Comp. Br. at 8. In this circumstance, the complainant's contention is valid. The complainant seeks a civil penalty of not less than \$60,000. The complainant reasons that this penalty amount will "get the attention" of J&F and others. Comp. Br. at 8-9.

The Appellate Court, Fourth District Appellate Court stated in ESG Watts Inc. v. PCB, 282 Ill. App. 3d 43, 52, 668 N.E.2d 1015, 1021 (4th Dist. 1996), that "the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider

when imposing penalties.” From June 7, 1997, J&F was fully aware that the open waste piles were in violation of the Act and the Board’s regulations. However, J&F failed to address the violations in order to comply with the Act and Board regulations. It is evident that the combined \$27,000 in penalties arising from the 1997 and 1999 consent orders failed to deter J&F from continuing to violate the Act and Board regulations. *See* Comp. Exh. E and F. Consequently, the Board agrees with the complainant that a higher penalty is necessary to deter further violations and to enhance voluntary compliance. The Board weighs this factor in favor of aggravation of the civil penalty.

Previously Adjudicated Violations. The terms of the 1997 consent order included that J&F admitted to past violation of Section 9.1(d)(1) of the Act. Comp. Exh. E at 12. Additionally, J&F agreed to refrain from future violations of the Act and the Board regulations. *Id.* Likewise, the terms of the 1999 consent order included that J&F admitted to past violation of Section 9.1(d)(1) of the Act. Comp. Exh. F at 28. Again, J&F agreed to refrain from future violations of the Act and the Board regulations. Comp. Exh. F at 29. Although these adjudicated violations involved inadequate notification and reporting of demolition activity, the violations are directly related to J&F’s construction demolition business. Furthermore, J&F’s conduct in this case contravenes the consent orders’ prohibition of further violation of the Act and Board regulations. Consequently, the Board weighs this factor in favor of aggravation of the civil penalty.

The Board Finding on Appropriate Civil Penalty. To arrive at the appropriate penalty, the Board has considered the factors of Section 33(c) and 42(h) of the Act. The Board previously found that J&F committed nine separate violations of the Act. J & F Hauling, PCB 02-21, slip op. at 8-9. Furthermore, the record reveals that the violations continued for a period of 1,175 days. The Board finds that J&F’s two-year continuing violation of the Act and Board regulations (subsequent to two consent orders forbidding prospective violation of the Act and Board regulations) coupled with the risks posed to nearby residents was egregious. Accordingly, the Board is convinced that the complainant’s requested civil penalty of \$60,000 is appropriate.

Consistent with Section 42(a) of the Act, the Board will order J&F to pay the civil penalty to the Environmental Protection Trust Fund. *See* 415 ILCS 5/42(a) (2002).

Costs and Attorney Fees

Section 42(f) of the Act provides that the Board may award costs and reasonable attorney fees to the Attorney General if the respondent “has committed a willful, knowing or repeated violation of the Act.” 415 ILCS 5/42(f) (2002). The complainant contends that J&F’s conduct from the time of the first Agency inspection on July 7, 1999, until J&F first began removal of waste in January 2002 amounts to a willful and repeated violation of the Act.

At the May 23, 2000 inspection, Ms. Van Orden observed new and increased waste piles instead of a reduction in waste. The Agency had issued a notice of violation to J&F, but J&F made no effort to comply with the Act or the Board regulations as a result of the violation notice until at least June 2001. Consequently, the Board finds that J&F knowingly and repeatedly

violated the Act and Board regulations. As a result, the Board will award costs and reasonable attorney fees to the Attorney General.

CONCLUSION

The facts and circumstances of record in this case show that J&F's violations of the Act and Board regulations were not reasonable. After consideration of the Section 33(c) and Section 42(h) factors, the Board imposes the complainant's requested civil penalty of \$60,000. In addition, within nine months J&F must remove the remaining open waste from its property to a properly permitted landfill. J&F must also conduct a special waste and hazardous waste determination and provide the results of that determination to the Agency within 45 days of the final opinion and order in this matter.

J&F's violations of the Act and Board regulations were committed knowingly and repeatedly. Therefore, the complainant is entitled to costs and reasonable attorney fees according to Section 42(f) of the Act.

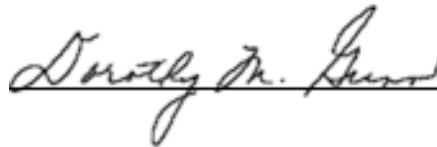
Because this interim opinion and order announces the appropriate remedy for J&F's violations of the Act and Board regulations, the Board incorporates by reference the findings of fact and conclusions of law from its June 6, 2002 order. This interim opinion and order constitutes the Board's findings of fact and conclusions of law.

ORDER

1. By February 20, 2003, the complainant must file with the Clerk of the Board an affidavit of the complainant's costs and attorney fees in this case with any further supporting documents.
2. J&F has 14 days from the date of service of the complainant's affidavit regarding costs and attorney fees to file a response.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 6, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board