

ILLINOIS POLLUTION CONTROL BOARD
February 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 95-64
) (Enforcement - Land)
 DONALD POINTER, MITCHELL HOLDER, and)
 WHITEWAY SANITATION, INC., an Illinois)
 corporation,)
)
 Respondents.)

INTERIM ORDER OF THE BOARD (by R.C. Flemal):

This matter, which is a case alleging improper operation of a landfill, is before the Board on two motions. The first is respondents March 1, 1996, motion to transfer the amended complaint to the Circuit Court of Jersey County, to which complainant responded March 24, 1997. The second motion is complainant's May 28, 1997, motion for partial summary judgment. The respondents have not replied to the motion for partial summary judgment.

For the reasons stated below, the Board retains jurisdiction of this case and grants complainant the requested partial summary judgment, finding respondents liable for the violations alleged in all but Counts III and a portion of County VII of the complaint. The hearing officer, in consultation with the parties, is directed to expeditiously establish hearing or briefing schedules addressing Count III liability issues as well as penalty and attorney fees issued, to allow for expeditious entry of a final order.

BACKGROUND

The site at issue, known as the Pointer Landfill (Site), occupies 6.5 acres of land in Jersey County, Illinois. The Attorney General filed this complaint on February 27, 1995, at the request of the Illinois Environmental Protection Agency (Agency) and on his own motion in the name of the People of the State of Illinois (complainant). The respondents are Donald Pointer, Mitchell Holder, and Whiteway Sanitation (collectively, Pointer or respondents). The Site is owned by Mitchell Holder and the operator of record is Donald Pointer. Donald Pointer is also the registered agent and president of Whiteway Sanitation Inc., an Illinois corporation operating the landfill on the Site. Amd. Com. at 2.

The Site was permitted for development in 1974 and has been permitted to accept waste since 1976. Some ten years before filing this action before the Board, on August 23, 1985, complainant filed a case against Donald Pointer and Mitchell Holder in the Jersey County Circuit Court regarding the same Site. People v. Donald Pointer et al., No. 85-CH-15. The complaint was subsequently amended to include Whiteway Sanitation as a defendant and add additional charges. The alleged violations concerned various operational violations which were observed during Agency inspections in 1985 and 1989, some of which continued through the signing of the final consent decree in December, 1990. These alleged violations included open dumping, open burning, litter and cover violations, and failure to deposit refuse into the toe of the landfill. The parties entered into an agreed interim order October 21, 1986, and entered into a final consent order on December 28, 1990. Amd. Com at 4, and Ex. 1, 2.

Complainant's January 29, 1996, seven-count amended¹ complaint, alleges numerous violations of the Act and the Board's regulations. To avoid repetition, the specifics of each count will be detailed in our discussion of the motion for summary judgment. At this point, it is sufficient to summarize the complaint as alleging permit violations and failure to submit monitoring reports, causing groundwater contamination and water pollution, inadequate control of leachate and water pollution, failure to meet final cover requirements, financial assurance violations, closure/post-closure care violations, and failure to employ a certified operator. The time period covered by the complaint differs for each violation, but generally spans the years 1985 to the present.

Finally, facts admitted during the course of this proceeding indicate that the site ceased accepting waste some time between March 1985 and February 1992. It has not, however, been certified closed. See discussion of Counts IV, V, and VI of the complaint, *infra*.

Complainant does not quantify the amount of monetary penalties it seeks for violations alleged in each count, asking instead for a penalty "not more than the statutory maximum" authorized by Section 42 of the Act. (415 ILCS 5/42) (1994). Complainant also requests attorney fees as authorized by Section 42 (f) of the Act, alleging that the respondents are in knowing and repeated violation of the Act.

MOTION TO TRANSFER

Respondents' motion requests that the Board transfer this case to the circuit court, alleging that the circuit court was the first to acquire jurisdiction over the parties and the subject matter of this complaint, that the parties had intended venue to remain there, and that the instant complaint realleges the same violations as in the court case, except for the "underground" violations (Count II). (Mot. Transfer at 2).

In the complaint itself, complainant alleges that the orders entered into by the State and respondents on October 21, 1986, and December 28, 1990, were not intended to and did not preclude further enforcement efforts. Amd. Com. at 5. In response to respondents' motion, the complainant also argues that the 1990 consent decree expired by its terms one year after its entry (Resp. para. 3, see also Mot. Transfer, Ex. D, p. 7.), so that the circuit court no longer has jurisdiction. The circuit court complaints and the Board complaints are not duplicitous, complainant explains, for two reasons: 1) the complaints "deal with different time frames, address violations different areas of the landfill and seek different remedies" (Resp. para. 2), and 2) the complaint in the circuit court was dismissed without prejudice, so that complainant is not relitigating any matter previously adjudicated on its merits. Complainant last contends that any ruling of the Board to decline to hear this case would amount to a limitation of its prosecutorial discretion to pursue this action in the forum of its choice.

In reviewing these arguments, we first note that neither party has cited the Board to any authority for their contentions. It is well settled that the Board and the circuit courts have concurrent jurisdiction over most violations of the Act. See *e.g. People v. NL Industries*, 152 Ill. 2d 82, 603 N.E.2d 349 (1992). But, the Board is unaware of any authority that gives it authority to transfer a case from an administrative agency in the executive branch of government to a court, and so denies the motion as posed.

If we interpret Pointer's motion as a request that we abstain from exercising any jurisdiction we may have, we must also deny the motion. The consent order does not by its terms vest

¹ Complainant's filed the original six-count complaint on February 27, 1995.

jurisdiction of all future claims in the court, and expired by its terms some six years ago. This case does not seek to enforce that prior order, but is a separate enforcement action which is not duplicative of any other pending or adjudicated action. Consistent with our decision in similar circumstances in People v. Chemetco ((March 21, 1996), PCB 97-76), we will exercise our jurisdiction to adjudicate this case and will proceed to consider the merits of the motion for summary judgment.

MOTION FOR PARTIAL SUMMARY JUDGMENT

The complainant's motion for summary judgment is accompanied by a memorandum in support as well as five exhibits. These exhibits are Pointer's development and operation permits (Mot. Sum. Jud. Ex. 1, 2), and Agency inspection reports dated March 19, 1985, May 25, 1990, and June 28, 1995, for a January 25, 1995, inspection (Mot. Sum. Jud. Ex. 3, 4, 5). The motion and its exhibits are not supported by affidavit.

In its prayer for relief, complainant seeks a finding that respondents are liable for all violations alleged in the complaint. It seeks a final order directing respondents to cease and desist from all violations and to come into compliance with the Act and Board rules, a civil penalty in an amount not to exceed that authorized by Section 42, but otherwise unspecified in amount, and attorneys fees and costs. In the event that there are any outstanding issues, complainant asks that the Board set them for hearing.

As previously stated, respondents have filed no reply to the motion. Under these circumstances respondent is deemed to have waived objection to the grant of the motion under 35 Ill. Adm. Code 103.140(c), and the Board also deems respondent to have waived objection to the lack of supporting affidavit. However, this does not relieve the Board of its responsibility under Section 33 (c) of the Act to make appropriate findings of fact and conclusions of law, particularly when dealing with a potentially dispositive motion, like this one for summary judgment. In addition to the complaint and motion for summary judgment, the Board references complainant's May 1, 1997, request for admission of facts (Req. Ad.). As none of respondents denied any of these requests, the facts are deemed admitted pursuant to 35 Ill. Adm. Code 103.162(c). On the other hand, respondents' failure to file an answer to the complaint factors into the Board's deliberations here only to the extent that we thereby deem such failure to be a denial of all allegations of the complaint pursuant to 35 Ill. Adm. Code 103.122(d).

Complainant's motion for partial summary judgment is granted in part, as outlined below. In summary, upon review of the pleadings and complainant's motion and supporting exhibits, the Board hereby finds that respondents have violated the Environmental Protection Act and the Board's regulations as particularized in the complaint originally filed in this matter on February 27, 1995, and the amended complaint filed on January 29, 1996, with exceptions as to Counts III and VII. The counts of the complaint and the evidence supporting them are set forth below.

Count I: Permits and Reports

Count I alleges respondents' deposit of refuse in an unpermitted area of the landfill and failure to submit quarterly groundwater monitoring reports in violation of Section 21(d), 21(d)(1) & (2), and 21(o)(11) of the Act (415 ILCS 5/21, (d)(1) & (2), and (o)(11)(1994)) and 35 Ill. Adm. Code 807.302 (1993). In proof of its allegations, complainant refers the Board to the operating and development permits, as well as to the facility inspections of March 19, 1985, and May 25, 1990. See Amd. Com. pp. 2-4, para. 4-7, 9-12,13-21; Mot. Sum. Jud., Ex. 1,2,3,4. The Board agrees that these materials support a finding of violation.

Count II: Groundwater Contamination/Water Pollution

Count II of the complaint alleges violations of groundwater standards at Sections 12(a), 12(d), and 21(d) of the Act (415 ILCS 5/12(a), 12(d), & 21(d) (1994)) and 35 Ill. Adm. Code 620.301(a), 620.302(c), 620.405, 620.420(d)(3), and 620.420(a)(2) (1993), and causing or allowing operation and/or development of a sanitary landfill so as to cause or threaten discharge of contaminants in violation of 35 Ill. Adm. Code 807.313 and 807.315 (1993). The evidence provided in support of this allegation includes a January 25, 1995, sampling report showing exceedences of the Class II groundwater standards for the parameters chloride, iron, total dissolved solids, and pH. The report also revealed the presence of chlorobenzene, miscellaneous phenols, and aliphatic acids. See Amd. Com., pp.10-11 para. 39-44; Mot. Sum. Jud., Ex. 5. The Board finds that respondents have committed the violations alleged in this count.

Count III: Leachate/Water Pollution

Count III of the complaint alleges respondents violated Sections 21(d)(2) and 12(a) & (d) of the Act (415 ILCS 5/21(d)(2) and 12(a) & (d) (1994)) and 35 Ill. Adm. Code 807.313, 807.314(e), and 807.318(a) & (b) (1993) by operating the landfill in such a manner as to cause or threaten or allow the discharge of contaminants into a water of the State. The amended complaint recites that these allegations are based on inspections which occurred on February 25, 1992, and October 14, 1993. See Amd. Com., pp. 12-13.

The Board cannot grant the requested summary judgment as to this allegation. Complainant's motion is totally silent about this count, and the referenced inspection reports are not included as part of the motion or the amended complaint. The Board will, however, grant the alternative motion and set this Count for hearing.

Count IV: Cover

Count IV of the complaint alleges failure to provide adequate final cover and to maintain existing cover, and operation of a landfill in a manner which resulted in uncovered refuse, in violation of Sections 21(d)(2), (o)(5), and (o)(6) of the Act (415 ILCS 5/21(d)(2), (o)(5) and (o)(6) (1994)) and 35 Ill. Adm. Code 807.305(c) (1993). Respondents have admitted that they have not applied final cover. Req. Ad. 33. The three inspection reports submitted also document cover violations. See Amd. Com. p. 14; Mot. Sum. Jud. Ex. 3-5. The Board accordingly finds respondents liable for the violations alleged in this count.

Count V: Financial Assurance

Count V alleges that respondents operated the landfill beyond March 1, 1985, and failed to post the required financial assurance for the closure and post-closure of the landfill in violation of Sections 21(d)(1) and 21.1(a) of the Act (415 ILCS 5/21(d)(1) and 21.1(a) (1994)) and 35 Ill. Adm. Code 807.601(b) and 807.602(b) (1993). Facts supporting these allegations were admitted by respondents (Req. Ad. 20, 33-35), and the Board accordingly finds respondents in violation of the Act and rules as alleged.

Count VI: Closure/Post-Closure

Count VI alleges that respondents operated the landfill beyond March 1, 1985, and failed to prepare the required closure and post-closure plans in violation of Sections 35 Ill. Adm. Code 807.501(b), 807.503(a) and 807.523 (1993). The non-response to complainant's request to admit, as well as the November 25, 1985, inspection report, support our finding that respondents are in

violation of the Act and Board rules regarding Count VI. Req. Ad.14, 15, 18, 19, 32; Mot. Sum. Jud. Ex. 3.

Count VI: No Certified Operator

Count VII alleges that in order to obtain a certification of closure by the Agency, the facility must employ at least one individual possessing Class A certification and having no such employee, respondents violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (1994)) and Section 1004 of the Solid Waste Site Operator Certification Law (225 ILCS 230/1004 (1994)).

In addition to alleging a violation of various Board rules, Count VII of the complaint alleges a violation of Section 1004 of the Solid Waste Site Operator Certification Law (225 ILCS 230/1004 (1994)). The Board does not have the jurisdiction to determine violations of the Solid Waste Site Operator Certification Law and this allegation is accordingly stricken from Count VII of the amended complaint. But, the Board does find respondent Donald Pointer, the operator of record, in violation of Section 21(d)(1) of the Act, on the basis of his non-response to the request to admit. (Req. Ad. 3.31).

Remedy

As to the remedy for the violations found here, the record in this matter is insufficient to allow the Board to grant the relief requested by complainant at this time. The Board reserves ruling on the issues of the appropriate compliance/cease and desist order, as well as penalty issues. The Board will, however, grant complainant's request that any outstanding issues be set for hearing.

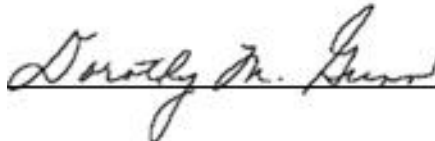
CONCLUSION

The Board denies the motion to transfer the complaint to the circuit Court. Complainant is granted partial summary judgment as follows. The Board finds respondents in violation of all provisions of the Act and Board rules as alleged in the amended complaint, Counts I, II, IV, V, VI, and VII. Summary judgment is denied as to Count III, which may be addressed at hearing, and to a portion of Count VII as noted above. Ruling is reserved on issues of appropriate relief, including penalty issues. The hearing officer is directed to expeditiously schedule this action for hearing consistent with this order. Upon completion of the hearing and receipt of any briefs thereafter, the Board will proceed to enter a final order in this case.

IT IS SO ORDERED.

Board Member G. Tanner Girard abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim order was adopted on the 19th day of February, 1998, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board