

ILLINOIS POLLUTION CONTROL BOARD
December 16, 2004

COUNTY OF VERMILION,)	
)	
Complainant,)	
)	
v.)	AC 04-22
)	(Vermilion County No. 03-03)
VILLAGE OF TILTON,)	(Administrative Citation)
)	
Respondent.)	
)	

JENNIFER RIGGS APPEARED ON BEHALF OF THE VERMILION COUNTY STATE'S ATTORNEY'S OFFICE; and

JOHN F. MARTIN OF MEACHUM & MARTIN LAW OFFICES APPEARED ON BEHALF OF THE VILLAGE OF TILTON.

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

The Board today decides whether respondent the Village of Tilton (Village) violated the Environmental Protection Act (Act) by causing or allowing the open dumping of waste in a manner that resulted in open burning of waste at First Avenue and 15th Street, Tilton, Vermilion County. For the reasons below, the Board finds that the Village violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2002)) as alleged by the County of Vermilion (County) in the administrative citation. The Board assesses the statutory civil penalty of \$1,500 and finds the Village liable for hearing costs incurred by the Board and the County.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the Agency and units of local government to enforce specified provisions of the Act through an administrative citation. 415 ILCS 5/31.1 (2002). Part 108 of the Board's procedural rules provides the process of a citation before the Board. 35 Ill. Adm. Code 108 *et seq.* Unlike other environmental enforcement proceedings in which the Act prescribes a maximum penalty, *see, e.g.,* 415 ILCS 5/42(b)(1), the Act sets specific penalties for administrative citations. 415 ILCS 5/42(4, 4-5) (2002). In cases such as this, the Board has no authority to consider mitigating or aggravating factors when determining penalty amounts. *Id.* "[I]f the Board finds that the person appealing the [administrative] citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty." 415 ILCS 5/31.1(d)(2) (2002).

PROCEDURAL HISTORY

On October 31, 2003, the County filed an administrative citation with the Board alleging that the Village violated the Act at First Avenue and 15th Street, Tilton, Vermilion County.¹ The citation specifically alleges that the Village violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2002)) by causing or allowing the open dumping of waste resulting in open burning. AC at 1.

As required, the County served the administrative citation on the Village within 60 days after the date of the observed violation, perfecting service on October 24, 2003. On November 26, 2003, the Village timely filed a petition to contest the administrative citation denying that it committed any violation. Pet. at 1. On December 4, 2003, the Board issued an order that accepted the petition for hearing.

On August 27, 2004, Board Hearing Officer Carol Webb, nee Sudman, conducted a hearing at the Vermilion County Courthouse Annex in Danville. At the hearing, Jennifer Riggs appeared and participated on behalf of the County, and John F. Martin appeared and participated on behalf of the County. Douglas Toole, a County health inspector, and David Phillips, the Mayor of the Village, testified at the hearing. Hearing Officer Webb found that credibility was not an issue in regards to either witness. Tr. at 37. Six photographs of the site were offered as exhibits at the hearing. Hearing Officer Webb accepted all six exhibits into evidence.

The hearing officer set a briefing schedule requiring the County's post-hearing brief to be filed on or before September 29, 2004; the Village's post-hearing brief to be filed on or before October 20, 2004; and the County's reply, if any, to be filed on or before October 27, 2004. Both parties timely filed briefs in this matter. The Board has not received a reply brief.

FACTS

On August 25, 2003, County inspector Douglas Toole (Toole) inspected the site. Tr. at 7. Toole has been a health inspector for the County since January 1992. Tr. at 6. He works in the Environmental Health division and since 1993 has worked primarily with solid waste nuisance complaints. *Id.* Toole took twelve photographs depicting the condition of the site that are attached to the inspection report. Three of the photographs were accepted into evidence as exhibits one through three. Tr. at 8-10.

Toole became familiar with the site as the result of an anonymous complaint in June 2003 when he gave the owner of the site, Mildred Butler, a compliance date concerning tires, truck trailers, a derelict building and other refuse on the site. Tr. at 7, 16. He first inspected the site on June 9, 2003 and saw tires, a deteriorating house, a semi-truck trailer, a camper, scrap metal and other refuse. Tr. at 17. Toole sent Mildred Butler a letter indicating the site was in violation of county ordinances and giving her until August 26, 2003 to bring the site into compliance. Tr. at 17. The site was not brought into compliance by August 26, 2003. Tr. at 17-18. Toole

¹ The Board cites the administrative citation as "AC at _."; the hearing transcript as "Tr. at _."; and the hearing exhibits as "Ex. 1 at _."

contacted Mayor Phillips and was informed that Thomas Excavating was going to help get the place cleaned up. Tr. at 18. Toole next inspected the site on August 25, 2003. *Id.* During that inspection, Toole discovered that some work had been done – items that had been scattered around were centralized in one pile that was smoldering. Tr. at 7-8. Toole saw brush, branches, scrap metal, demolition debris, boards, fencing and what appeared to be rims and steel belts from tires in the pile. Tr. at 8. Toole noticed scorch marks on the boards, tire rims and some of the metal in the pile. *Id.*

Toole testified that he contacted Mayor David Phillips on July 7, 2003, and was informed that the Village had an option to purchase the site, didn't legally own it, but had agreed on a price. Tr. at 11. Toole testified that Mayor Phillips told him village workers had "piled stuff up there and burned some brush and some other items." Tr. at 12. Toole stated that the Mayor told him that Village workers had burned the pile. Tr. at 13.

Toole contacted Butler on October 1, 2003, and was informed that the Village was taking care of the cleanup, after having been given a copy of the compliance letter in June 2003. Tr. at 19. Toole returned to the site on October 17, 2003, and found the waste pile had been removed. Tr. at 19.

The site has been used over the years as a haunted house and an entrance to the drive-in theater. Tr. at 23. The Village is interested in developing the site. Tr. at 24.

Mayor Phillips testified that the Village did not put any of the items or materials on the site, and has never dumped anything at the site. Tr. at 24. Mayor Phillips testified that when contacted by Toole in 2003, he informed him that the Village was going to clean up the site. Tr. at 24-25. According to Mayor Phillips, the Village plowed fence rows, cut up several trailers and took them to a scrap yard, and removed 53 tires. Tr. at 25. Mayor Phillips testified that the Village "plowed the trees out, fence row and piled it into a pile and then burnt it." Tr. at 26. The Village spent \$7,000 on the site. *Id.*

The Mayor stated that the Village fire department burned trees, fence and brush, but that the Village did not stack up any pile of debris. Tr. at 27. The Village removed three semi loads from the site to a local landfill. Tr. at 28.

STATUTORY BACKGROUND

Section 3.300 of the Act defines "open burning" as:

"[T]he combustion of any matter in the open or in an open dump. 415 ILCS 5/3.300 (2002).

Section 3.305 of the Act defines "open dumping" as:

"[T]he consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a landfill." 415 ILCS 5/3.305 (2002).

Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2002).

Section 3.535 of the Act provides that:

“Waste” means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.135, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto. 415 ILCS 5/3.535 (2002).

Section 21(a) of the Act provides that no person shall:

Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2002).

Section 21(p) of the Act provides that no person shall, in violation of subsection (a) of this Section:

Cause or allow the open dumping if any waste in a manner that results in any of the following occurrences at the dump site:

(3) open burning. 415 ILCS 5/21(p) (2002).

Section 31.1(d)(2) of the Act provides that:

“[I]f the Board finds that the person appealing the [administrative] citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.” 415 ILCS 5/31.1(d)(2) (2002).

Section 42(b)(4-5) of the Act provides that:

“In an administrative citation 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 \$1,500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. . . .” 415 ILCS 5/42(b)(4-5).

DISCUSSION

The Board must first determine whether the Village caused or allowed the open dumping of waste at the site. 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 landfill.” 415 ILCS 5/3.305 (2002). The term “refuse” means “waste.” 415 ILCS 5/3.385 (2002). The Act defines “waste” to include “any garbage . . . or other discarded material.” 415 ILCS 5/3.535 (2002).

The Board finds that the material on the site is refuse as defined in the Act, and that the site does not have a permit to operate as a landfill. It is evident, then, that open dumping occurred at the site. The Board must next determine whether the Village “caused or allowed” the open dumping. The Village has argued that someone unaffiliated with the Village brought the material to the site, and that the Village did not put any materials on the site or ever dump anything on the site. Village Br. at 4; Tr. at 24. The Village denies that it burned anything other than brush and asserts there is no evidence indicating otherwise. Village Br. at 7.

To find a violation, the County “must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the of the premises where the pollution occurred.” People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993) citing Phillips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 390 N.E.2d 620, 28 Ill. Dec. 453. The County proved that the Village exercised control over the site. The record shows that while the Village did not own the property, it had undertaken cleanup at the site, and in so doing exercised control over it. Although the waste on the site appears to have been placed on the site prior to the Village’s involvement, the Village consolidated the waste into a pile that the Village Fire Department burned. The Village acknowledges forming a pile of brush. The waste could not have been placed in the pile until after the pile was formed, and was discovered when the pile was still smoldering. Thus, the waste was placed in the pile while the Village exercised control over the site.

The Board has previously held that passive conduct amounts to acquiescence sufficient to find a violation of open dumping. Sangamon County Dept. of Public Health v. Hsueh, AC 92-79 (July 1, 1993). The Illinois Supreme Court has established that one may “cause or allow” a violation without knowledge or intent. See People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991); Freeman Coal Mining v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974). The Board finds that the Village did cause or allow the open dumping of waste at the site.

Now that the Board has found that open dumping of waste occurred at the site, it must be determined whether that open dumping resulted in open burning. It is undisputed that scrap metal, demolition debris, boards, fencing, as well as what appeared to be rims and steel belts were burned at the site. As previously noted, the Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.23 (2002). The Board has found that the Village caused or allowed the open dumping of the waste at the site, and that the waste was burned. Accordingly, the Board finds that the Village violated Section 21(p)(3) of the Act.

The Village’s argument that any claimed violation resulted from uncontrollable circumstances is not persuasive. The open dumping and burning occurred during the time when

the Village exercised control over the site. The Board cannot find that the violations resulted from factors beyond the Village's control.

PENALTY

Section 42(b)(4) of the Act provides for penalties in an administrative citation action as follows:

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 \$1,500 for a first offense and \$3,000 for a second or subsequent offense, plus any hearing costs incurred by the Board and the Agency. The penalties shall be deposited into the Environmental Protection Trust Fund, to be used in accordance with the provision of the Environmental Protection Trust Fund Act. 415 ILCS 5/42(b)(4) (2000).

Because the Board finds that the Village has violated one subsection of Section 21 and that it is a first offense, the Board will order the Village to pay a civil penalty of \$1,500, plus costs, in its final order. The County and the Board are also entitled to their hearing costs under Section 42(b)(4) of the Act, but no information on these costs is included in the record. Therefore, the County and the Clerk of the Board are ordered to file a statement of hearing costs within 14 days of this order. The statement must be supported by affidavit, and served on the Village.

CONCLUSION

After reviewing the record in this case and the relevant portions of the Act, the Board finds that the Village caused or allowed the open dumping of waste resulting in open burning.

The Board further finds that none of the issues raised by the Village constitute "uncontrollable circumstances" that justify dismissing the administrative citation. Consequently, the Board finds that the Village has violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2002)) and in its final order will order the Village to pay a civil penalty of \$1,500. As set forth below, the Board directs the County and the Clerk to document hearing costs, after which the Board will issue a final order. This interim opinion constitutes the Board's interim findings of fact and conclusions of law.

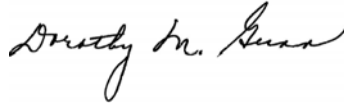
ORDER

1. The Board finds that the Village of Tilton (Village) violated Sections 21(p)(3) of the Act. 415 ILCS 5/21(p)(3) (2002).
2. The County of Vermilion (County) must file a statement of its hearing costs within 14 days of this order, on or before December 30, 2004. The statement must be supported by affidavit and served on the Village. Within the same 14-day period, the Clerk of the Illinois Pollution Control Board must also file and

serve on the Village a statement of the Board's hearing costs supported by affidavit. The Village may file any objections to those statements within 14 days of service.

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 December 16, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board