

ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

COUNTY OF OGLE,)	
)	
Complainant,)	
)	
v.)	AC 92-64
)	Dockets A & B
)	(Administrative Citation)
ROCHELLE DISPOSAL SERVICE,)	County No. 91-R-1003
INC., and CITY OF ROCHELLE,)	
ILLINOIS,)	
)	
Respondents.)	

MS. ROBBIN STUCKERT, ASSISTANT STATE'S ATTORNEYS OF OGLE COUNTY, APPEARED ON BEHALF OF THE PETITIONER;

MR. KURT KLEIN APPEARED ON BEHALF OF ROCHELLE DISPOSAL SERVICES, INCORPORATED.

OPINION AND ORDER OF THE BOARD (by C. A. Manning):

This action was initiated on September 10, 1992, by the filing of an administrative citation by the County of Ogle (County). The administrative citation was filed pursuant to Section 31.1 of the Illinois Environmental Protection Act (Act). The authority to issue administrative citations was delegated to the County pursuant to Section 4(r) of the Act. (415 ILCS 5/31.1 and 5/04(r) (1992).) The administrative citation charges Rochelle Disposal Services (Disposal) and the City of Rochelle (City) with violation of Section 21(o)(5). Disposal filed a petition for review and motion to strike and dismiss on September 18, 1992. The county filed a response on September 22, 1992. On October 1, 1992 the Board issued an order denying Disposal's motion to be dismissed as a party to this action.

A public hearing in this matter was held pursuant to Section 32 of the Act on May 13, 1993, at the Ogle County Courthouse in Oregon, Illinois. On July 1, 1993, Disposal filed a memorandum and argument in support of its position in this case. No other briefs were filed.

BACKGROUND

The Respondents are charged with lack of daily cover in violation of section 21(o)(5) of the Act. The landfill at which the alleged violation occurred is owned by the City. Disposal operates Rochelle Municipal Landfill under a contract between it

and the City. The alleged violation took place on July 10, 1992. Ogle County alleges that the county inspector, Stephen Rypkema, arrived at the landfill for a regular inspection at 6:39 a.m. and found a lack of daily cover. In the administrative citation, the County charged the Respondents with only one violation and therefore assessed a penalty of \$500 as provided for in Section 42(b)(4) of the Act.

ISSUES

A. Proper Party

In its memorandum and argument submitted to the Board on July 1, 1993, Disposal claims that it is not a proper party since it does not "conduct" a sanitary landfill operation as the term is intended in the Act. (Mem. at 5-6.) Disposal states that the permit to operate a landfill at the site in question was issued by the Agency to the City of Rochelle (City) and that Disposal merely has a contract to work at the site. (Mem. at 6.) Thus, Disposal argues it is the contractor, not the operator. (Mem. at 6.) Additionally, Disposal argues that it is the City that has control over the hours of operation, what is dumped at the site, and the type of "cover" and grading to be done at the site. (Mem. at 6.)

Although no reply was filed by the County to Disposal's memorandum and argument, the response filed by the County on September 22, 1992, to Disposal's motion to strike and dismiss deals directly with this issue. In its response, the County states that Disposal is the current operator of the landfill facility. (Resp. at 1.) Additionally, the County argues that the AC statute does not limit prosecution solely to the holder of the permit and that Disposal is subject to the enforcement jurisdiction of the Board. (Resp. at 2.)

B. Lack of Daily Cover

At hearing, Stephen Rypkema testified for the County. He stated that when he arrived at the landfill site at 6:39 a.m., he found uncovered refuse at the eastern edge of the daily fill area. Additionally, he testified that two vehicles were unloading waste at the end of the roadway on the west end of the daily fill area. (Tr. at 17-19.)

Stephen Rypkema testified that he estimated the uncovered area at the eastern edge of the site to be approximately 40 by 20 feet at one end, tapering down to 10 feet at the other end. (Tr. at 20.) Under cross examination, Stephen Rypkema stated the cell in question was partially covered. (Tr. at 40.) Additionally, he testified the soil around the cell area was moist. (Tr. at 50.)

At hearing, Clyde Gelderloos, President of Disposal testified on behalf of the Respondents. He testified that fifty percent of the landfill cell in question had to be lined. (Tr. at 64.) Gelderloos further stated that the purpose of the liner is to protect the aquifers and that the integrity of the liner is very important. (Tr. at 67.) He explained that in order to protect the integrity of the liner and to keep it from being damaged, the landfill operators were instructed to not come within three feet of the exposed liner. (Tr. at 69-70.) Additionally, moist soil aggravates the situation and drivers have to be even more careful under moist-soil conditions. (Tr. at 71.)

Although he was not at the site the night before the inspection, Gelderloos further testified that it was his belief only approximately three feet of material was left uncovered. In order to cover the material, the driver would have had to come too close to the liner, endangering the liner in light of the moist soil conditions. (Tr. at 72.)

Finally, Clyde Gelderloos indicated that Disposal currently has an alternative daily cover permit which allows them to cover areas such as the one in question with a canvas cover. (Tr. at 75.) Gelderloos stated that at the time of the alleged incident, Disposal did not have any permits which would allow them to deviate from the daily cover rule. (Tr. at 76.)

DISCUSSION

A. Proper Party

The Board will first address Disposal's jurisdictional argument that it is not a proper party to this action. On October 1, 1992, the Board issued an order denying Disposal's motion to strike and dismiss. In the order, the Board stated that "Rochelle Disposal is properly a party to this action as a person conducting a waste operation at a permitted site." (County of Ogle v. Rochelle Disposal Service, Inc., and The City of Rochelle, (October 1, 1992) AC 92-64, 136 PCB 259 at, 260.) Pursuant to the Act, Disposal is a person conducting a waste operation at a permitted site. The pertinent section of 21(o) of the Act states: "no person shall conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:...." (Id. at 260.)

Based on the record and the Board's previous decision on this issue the Board finds that Disposal is a proper party in this proceeding.

B. Lack of Daily Cover

The administrative citation issued against the Respondents charged them with a violation of Section 21(o)(5). (AC at 1.) Section 21(o)(5) prohibits any person from conducting a sanitary landfill which is required to have a permit in such a manner as to leave uncovered waste remaining from a previous operating day or at the conclusion of an operating day. The permit must contain an express condition allowing waste to remain uncovered for an extended period of time.

The operating permit issued to the City of Rochelle pursuant to Section 21(d) contains no such condition. In fact, the permit specifically requires that "waste must be compacted in layers and covered daily with six inches of suitable material." (Resp. attachment.) It is readily apparent from the hearing testimony that both the County and Disposal believed a section of the landfill cell was left uncovered at the end of an operating day. Therefore, the Board finds that on July 10, 1992, the Respondents violated Section 21(o)(5) of the Act.

Disposal argues that in cases where the record demonstrates a violation occurred, the Board may refrain from imposing a penalty if "... the person appealing the citation has shown that the violation resulted from uncontrollable circumstances." (415 ILCS 5/31.1(d)(2) (1992).) At hearing and in the memorandum and argument, Disposal suggests that an "uncontrollable circumstance" prevented a three-foot section from being covered at the end of the operating day. The "uncontrollable circumstance" in question was Disposal's belief that the integrity of the cell liner would have been in jeopardy had the landfill cell been fully covered.

The Board has addressed the issue of "uncontrollable circumstances" in several recent decisions. In St. Clair County v. J & R Landfill, Inc., 111 PCB 143, AC 89-18 (May 10, 1990), the Board found that weather conditions may cause uncontrollable circumstances which prohibit a landfill from picking up litter¹. Also at issue in St. Clair County, was whether the landfill's failure to cover refuse was due to an uncontrollable circumstances. In that case the landfill argued that, due to uncontrollable circumstance of wet weather conditions, it was unable to cover the refuse. The Board disagreed. It found that since part of the refuse was covered, wet conditions did not create an uncontrollable circumstance that caused the rest of the

¹ Section 21(o)(12) of the Act requires landfills to collect and contain litter from the site by the end of each day. The landfill successfully argued that weather conditions that kept the employees from picking up the litter and that at times froze the litter to the ground created an uncontrollable circumstances.

refuse to remain uncovered. Similarly in Illinois Environmental Protection Agency v. ESG Watts, Inc., 112 PCB 47, AC 89-131 (June 7, 1990), a landfill argued that wet conditions of the cover materials was an uncontrollable circumstance that kept it from providing daily cover for the refuse. The Board found that since ESG Watts could have foreseen this circumstance, it could have taken action to provide cover. Thus the Board denied the uncontrollable circumstance defense. Finally, the Board has also held that passive conduct amounts to acquiescence sufficient to find a violation of the Act. (See, EPA v. Dobbeke et al. (August 22, 1972), PCB 72-130, 5 PCB 219 discussing a violation of Section 21(a) of the Act.) Disposal had knowledge of the problem of uncovered refuse before receiving the citation and in fact had a policy of not allowing its employees to come near the end of the refuse where there was exposed liner for fear of causing damage to the liner. Disposal declined to take alternative action to cover the refuse². Therefore, the Board does not find any uncontrollable circumstances relating to this violation and the Board finds Respondents in violation of Section 21(o)(5) lack of daily cover.

PENALTY

Penalties in administrative citation actions are prescribed by Section 42(b)(4) of the Act which states:

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; (415 ILCS 5/42(b)(4) (1992).)

Disposal argues that it should not be made to pay the \$500 fine since it is now in compliance with the law³. Subsequent

² Since the citation, Disposal has obtained a permit to allow it to use an alternative cover method, canvas cover.

³ Disposal argues that mitigating factors should relieve it from the penalties in this administrative citation proceeding. Disposal in support of this argument cites Harris-Hub Co. v. Pollution Control Board, 50 Ill. App.3d 608, 8 Ill. Dec. 685, 365 N.E.2d 1071 (1977), Archer Daniels Midland v. Pollution Control Board, 149 Ill.App.3d 301, 102 Ill.Dec. 687, 500 N.E.2d 580 (1986), and Wasteland, Inc. v. Pollution Control Board, 18 Ill.App.3d 1041, 75 Ill.Dec. 143, 456 N.E.2d 964 (1983). The Board recognizes that

compliance does not relieve the respondent from a finding of a violation or from payment of the required penalty. (See, IEPA v. Jack Wright (August 30, 1990), AC 89-227, 114 PCB 863 and Sangamon County v. Dave Phillips and Earle Phillips, (July 1, 1993) AC 93-12, __ PCB__.)

Respondents will therefore be ordered to pay a civil penalty of \$500 based on the violation as found. Further, pursuant to Section 42(b)(4) of the Act, respondents are also required to pay hearing costs incurred by the Board and the County. The Clerk of the Board and the County of Ogle will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon respondents. 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.

For the reasons stated in the above opinion, the Board finds that the respondents, the City of Rochelle and Rochelle Disposal Inc., have violated Section 21(o)(5) of the Act. Accordingly, the respondents are jointly and severally liable for a penalty of \$500.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Respondents, the City of Rochelle and Rochelle Disposal Inc., are hereby found to have violated 415 ILCS 5/21(o)(5) (1992).
2. Within 30 days of this order, the Respondents shall pay the sum of five hundred dollars (\$500.00) by check or money order to the Ogle County Treasurer. The payment shall be mailed to:

Ogle County Treasurer
Ogle County Courthouse
P.O. Box 40
Oregon, Illinois 61061.

Respondents shall also write their Federal Employer Identification Number or Social Security Number on the certified check or money order.

in an enforcement proceeding arguments of mitigating factors could be made to reduce a penalty. The Board does not look to "mitigating factors" in an administrative citation proceeding.

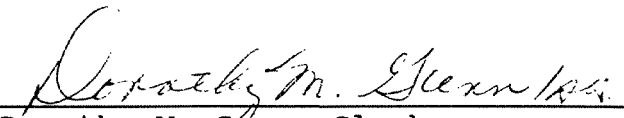
Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003 (1992)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue 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 County shall file a statement of its hearing costs, supported by affidavit, with the Board and with service on the Respondents. 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 the Respondents. Such filings shall be entered in Docket B of this matter.
5. Respondents are 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.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992).) provides for appeal of final orders of the Board within 35 days. The rules of the Supreme Court of Illinois establish filing requirements. See also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 26th day of August, 1993, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board