ILLINOIS POLLUTION CONTROL Board
January 23, 1992

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	AC 89-215
	)	Docket A & B
v.	)	(Administrative Citation)
	)	(IEPA No.9926-AC)
OMER THOMAS,	)	
Respondent.	)	

MR. RICHARD C. WARRINGTON JR., ASSISTANT COUNSEL, APPEARED ON BEHALF OF COMPLAINANT.

MR. STEPHEN F. HEDINGER, APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes to the Board on an Administrative Citation filed by the Illinois Environmental Protection Agency ("Agency") pursuant to the Illinois Environmental Protection Act ("Act"). (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1001 et. seq.) The citation was filed October 5, 1989, and alleges that Respondent, Omer Thomas, the operator of a facility located in Shelby County, Illinois is in violation of Section 21(q) (1) of the Act for causing or allowing open dumping of waste that results in litter.

A Petition for Review was filed with the Board on November 1, 1989. A hearing was held on July 27, 1990, in Shelbyville which neither party attended. [1] A second hearing was held on July 19, 1991. The Agency filed its post hearing Brief on September 16, 1991 [2] and respondent filed his post hearing brief on September 30, 1991.

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. 1021.) Section 21(p) of the Act applies to sanitary landfills permitted under the Act while Section 21(q)

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[1] An Agency motion for continuance had not been received by the Hearing Officer or Board in time to cancel the hearing.

[2] The Agency filed a motion for leave to file instanter with its brief. The motion is granted.

applies to all dump sites. The administrative citation issued against Mr. Thomas alleges violation of subsection (1) of Section 21(q). Section 21(q) provides that:

21. No person shall: ...

q. In violation of subdivision (a) of this Section, 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;

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 Agency must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted in litter, or other specified conduct at the dump site. Pursuant to Section 31.1(d)(2) of the Act, if the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty. Respondent has two defenses to an administrative citation. The first is to show that the violation did not occur; the second that it occurred but was due to uncontrollable circumstances. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031.1(d)(2).) Therefore, the initial inquiry in this case is whether Mr. Thomas' conduct constitutes causing or allowing open dumping which resulted in litter.

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 3.52 defines "waste" as, inter alia, "garbage.... or other discharged material ...." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.53.)

In St. Clair County v. Louis I. Mund, AC 90-64, August 22, 1991, _____ PCB _____, the Board adopted the definition of "litter" contained in the Litter Control Act. (Ill. Rev. Stat. 1990 Supp., ch. 38, par. 86-1 et seq.) The Board further held that the word "litter" as used in Section 21(q)(1) of the Act does include refuse or debris dumped on private property with the consent of the owner of such property.

Mr. Thomas is the present owner of several parcels of ground in Shelbyville, Shelby County, Illinois. The property consists of the south half of three adjoining lots (numbered 2, 3, and 4) and the whole of the fourth adjoining lot (numbered 5) all located along the north side of the undeveloped Second Street corridor. The property and the open dump site relevant to this matter are located generally south of south First Street, east of the railroad tracks, and west of the Kaskaskia River. (Tr. at 34.) Mr. Thomas' property and the open dump site are accessible through a private access road.

On August 9, 1989, Mr. Allyn Colantino, Agency field inspector, inspected this site in response to neighbors' complaints that certain wastes were being dumped that could cause harmful run-off into the river. At hearing, Mr. Colantino testified that he surveyed and photographed the open dump site which he estimated was 300 square foot in size. He identified the material on the site as "mostly demolition waste in addition to dimensional lumber, shingles, metal, tin, tires, white goods, rugs, linoleum." (Tr. at 6.) Also present were large pieces of concrete. (Tr. at 10.) Mr. Colantino made several site sketches at the area, which he included in the Agency's inspection report package. Also included in the package were the photographs, a map from the County Clerk's office and a taxbill for Mr. Thomas property. (Tr. at 8.) The Agency inspection report was introduced as an exhibit at the hearing.

Respondent argues that the Agency inspector did not "directly observe" Mr. Thomas violating the Act but that "all [he] observed was the existence of items placed in a ravine, but he did not see who placed them there, or the circumstances of the placement." Section 31.1(b) states that an administrative citation may be issued when the Agency or its delegate "on the basis of direct observation" determines that there is a violation of Section 21(p) or (q). The Board has consistently held that the direct observation of an open dump, supported by affidavit and photographs, is sufficient basis for determining that a violation of Section 21(a) has occurred. The Board finds that Mr. Colantino has presented sufficient evidence to prove he directly observed an open dump on Mr. Thomas' property.

Respondent then argues that the site is not an open dump because the Agency did not prove that the items at the site were "waste". Respondent contends that the Agency must provide proof of the prior origin of the items to prove they are "waste" and cites J. R. Bliss, Inc. v. I.E.P.A., 138 Ill.App.3d 699, 485 N.E. 2d 1154 (5th Dist. 1985) (proof of the prior use or origin of a substance must be present to establish that a substance is a "waste") in support of this argument. The photographs submitted by the Agency clearly show that the items at the site have been used for their primary purpose already and do not appear to have originated at the site. In addition, the photographs show that

the items are not sorted or stacked as if for reuse or further use but dumped in jumbled piles. The Board finds that the Agency photographs provide proof that the items constitute "waste".

Respondent lastly argues that the Agency failed to prove that the items at the site constitute litter as defined by the Agency. At hearing, the Agency inspector referred to the definition of litter in the Litter Control Act, effective January 1, 1974. (Ill. Rev. Stat. 1990 supp., ch. 38, par. 86-1 et seq.) Respondent argues that the Chapter 38 definition of litter as "any discarded, used, or unconsumed substance or waste" is equal to the Act's definition of "waste" and makes a nullity of Section 21(q)(1). The Board finds this argument unpersuasive because the Respondent is using only one phrase of the Chapter 38 definition of litter to support this argument. Chapter 38 also states that "litter" may include "anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly." (Ill. Rev. Stat. 1990 Supp., ch. 38, par. 86-3. See, St. Clair County v. Louis I. Mund, AC 90-64, August 22, 1991, ___ P.C.B. ___.

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

During cross-examination, Mr. Colantino testified that based on the City's map and the tax bill, part of the open dump and portions of the access road are located on Mr. Thomas' property.[3] (Tr. at 20-22, 34.) Respondent has not contested the Agency's proof of ownership. With reference to the access road, Mr. Colantino stated that "[a]t the entranceway there was a cable that was lying on the ground. It was not locked. I had no problem with restriction as to entry into the property." (Tr. at 9.) Neither did he see any signs indicating restricted access. (Tr. at 16, 23.)

Respondent argues that the Agency did not prove that Mr. Thomas had control over access to the site. In support of this argument he claims that the Agency inspector's site map depicts the access road entranceway with the cable as located on the north half of lot 2 which Mr. Thomas does not own. Respondent therefore concludes that he is not responsible for another owner's omissions. This argument ignores the fact that both of the Agency inspector's site maps indicate that the rest of the access road traverses land owned by Mr. Thomas. In fact, it is

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[3] Mr. Colantino noted at the hearings that the site sketches he drew were not very accurate in depicting the property boundaries. (Tr. at 22)

undisputed by Respondent that the final part of the road leading onto the dump site is on lot 5. Mr. Thomas owns all of lot 5. Respondent clearly has control over access to the open dump site.

Respondent also claims that the Agency did not prove but only inferred that Mr. Thomas caused or allowed open dumping. The Board has previously considered many cases interpreting the "cause or allow" language. In IEPA v. A. J. Welin, PCB 80-125, May 13, 1982, 47 PCB 7, the Board stated that the "cause or allow" language of Section 21(a) includes "passive conduct [which] amounts to acquiescence sufficient to find a violation." See, also, EPA v. Village of Port Byron, PCB 72-67, October 24, 1982, 6 PCB 9; EPA v. Dobbeke et al., PCB 72-130, August 22, 1972, 5 PCB 219; EPA v. Village of Darnad, PCB 74-381, March 6, 1975, 16 PCB 13; and EPA v. Maney et al., PCB 79-262, August 31, 1980, 39 PCB 363.

The Appellate Courts of Illinois have also interpreted the "cause or allow" language contained in various sections of the Act. The "cause or allow" language of Section 12(a) of the Act was interpreted by the Third District Appellate Court to mean that the owner of a property has a duty, imposed by legislation, to take all prudent measures to prevent pollution. Any efforts to control pollution go to the issue of mitigation, not to the primary issue of liability. Freeman Coal Mining Corp. v. IPCB, 21 Ill.App.3d 157, 313 N.E.2d 616 (1974). In Bath, Inc. v. IPCB, 10 Ill.App.3d 507, 294 N.E.2d 778 (1973), the Fourth District held that when determining whether burning had been caused or allowed, "knowledge, intent or scienter is not an element of the case to be established by the [Agency] at the hearing before the [Board]." The Fifth District relied upon the Bath rationale 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 alleged polluter argued that it was unreasonable to expect a mere owner to exercise control over or prevent pollution, especially when the owner is unaware of the pollution. The court stated that the "Act is malum prohibitum, no proof of guilty knowledge or mens rea is necessary to a finding of guilt." This theory was reiterated by the Third District in Perkinson v. IPCB, 187 Ill.App.3d 689, 546 N.E.2d 901 (1989). In Perkinson the court stated that it was "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 lacked the capability to control the source . . . or had undertaken extensive precautions to prevent vandalism or other intervening causes."

Based on the facts presented in this case and the legal principles outlined by this Board and the Courts, we conclude

that Mr. Thomas did "cause or allow" the open dumping described in this proceeding.

The Board's final inquiry is whether Mr. Thomas has shown that the violation resulted from uncontrollable circumstances. If the Board so finds, then no violation would be found and no penalty imposed. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031.1(d)(2).) The record raises no basis for a conclusion of uncontrollable circumstances. The record shows that Mr. Thomas, as owner of the land carrying the access road, has either taken no precautions to stop trespassers and illegal dumpers (if the cable is owned by someone else) or has made only a minimum effort by installing a cable gate with no lock and no maintenance. Therefore, the Board finds that the violations did not result from uncontrollable circumstances and Mr. Thomas is in violation of Section 21(q)(1) of the Act.

CONSTITUTIONAL ISSUES

Respondent's Brief of September 30, 1991 raises several constitutional issues. The Respondent cites Section 4(d) of the Act as restraining the Agency to inspections in accordance with constitutional limitations in support of his argument that the Agency conducted an illegal search. The Board finds this argument unpersuasive since Section 4(c) and 4(e) grant to the Agency both the authority and the duty to inspect and investigate violations of the Act or Board regulations. (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1004(c) and(e).) Section 4(e) also specifically references the Agency's duty to issue administrative citations.

Respondent next argues that this cause should be dismissed because the administrative citation proceedings are criminal proceedings which the Board does not have the authority to prosecute. In support of this argument Respondent states that the fixed amount of the penalty in administrative citation cases, as provided for in Section 42(b)(4), indicates a punitive instead of a civil penalty. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042 (b)(4).) In addition, Respondent states that the Agency's reliance upon the definition of litter found in the Litter Control Act, Ill. Rev. Stat. 1989, ch. 38, par. 86-1 et. seq., constitutes a prosecution of a crime. Respondent does not cite any case law in support of his arguments. The Act describes the penalty for administrative citations as a 'civil penalty'. As there is no case law supporting Respondent's argument contesting this description, and since the Board does not have the authority to review its enabling statute, the Board does not find this proceeding need be dismissed because it is criminal in nature. Neither does the Board find that the Agency reliance on a definition contained in a different Act, alter the language and intent of the Environmental Protection Act.

In support of his final argument that the administrative citations penalty is an unconstitutional violation of the separation of powers, Respondent relies upon two Supreme Court of Illinois cases. City of Waukegan v. PCB, 57 Ill.2d 170, 311 N.E.2d 146 (1975) and Southern Illinois Asphalt Co. v. PCB, 60 Ill.2d 204, 326 N.E.2d 406 (1975) both concerned the provision of the Act in Section 42(a) that provides for the imposition of a discretionary monetary penalty by the Board. The Supreme Court in both cases found that the Board's authority under 42(a) did not violate the constitutional separation of powers, because of the protective guidelines in the Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1033 (c)) and the opportunity for judicial review (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041). The cases are distinguishable from the matter presently before the Board in that the penalty provision at issue here is not discretionary, but ministerial. The statute contains the equation to be used (# of violations x $500) and the Board merely makes the final calculation. The Supreme Court has held that a ministerial type of penalty is constitutional. See, Dept. of Finance v. Gandolphi, 375 Ill. 237, 30 N.E.2d 737 (1940); Dept. of Finance v. Cohen, 369 Ill. 510, 17 N.E.2d 327 (1938).

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 (q) 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 $500 based on the violation 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 Agency. The Clerk of the Board and the Agency will therefore be ordered to each file statement of costs,

supported by affidavit, with the Board and with service upon Mr. Thomas. 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 August 9, 1989, of Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1021(q) (1).

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
   P.O. Box 19276
   Springfield, Illinois 62706

   Respondent shall include the remittance form and write the case name and number and their social security or federal Employer Identification Number on the certified check or money order.

   Penalties unpaid after the due date shall accrue interest pursuant to Section 42(g) of the Illinois Environmental Protection Act.

3. Docket A in this matter is hereby closed.

4. Within 30 days of this Order, the Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Omer Thomas. 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 Omer Thomas. Such filings shall be entered in Docket B of this matter.

5. 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. 111 1/2, 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.

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 23rd day of January, 1992, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board