BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, v. SPEEDY GONZALEZ LANDSCAPING, INC., Respondent.	)	AC 06-039 (Administrative Citation)

NOTICE OF FILING

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PLEASE TAKE NOTICE that on May 13, 2008 Complainant filed with the Clerk of the Illinois Pollution Control Board the attached CITY OF CHICAGO'S REPLY TO SPEEDY GONZALEZ LANDSCAPING, INC.'S POST-HEARING BRIEF, a copy of which is served upon you.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 13, 2008, he caused copies of this notice and the documents referenced therein to be served on the persons listed above by U.S. Mail, first class postage prepaid.

Graham G. McCahan

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, v. SPEEDY GONZALEZ LANDSCAPING, INC., Respondent.	)	AC 06-39 (Administrative Citation)

CITY OF CHICAGO'S REPLY TO SPEEDY GONZALEZ LANDSCAPING, INC.'S POST-HEARING BRIEF

Complainant, the City of Chicago Department of Environment ("CDOE"), hereby submits the following as its Reply to Respondent Speedy Gonzalez Landscaping, Inc.'s Post-Hearing Brief. In support thereof, CDOE states as follows:

INTRODUCTION

The narrow issues before this Board are whether CDOE has demonstrated that there existed violations of sections 21(p)(1), 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7)(i) of the Illinois Environmental Protection Act[1] (the "Act") (415 ILCS 5/21) at 1601 E. 130th Street in Chicago, Illinois (the "Site") on March 22, 2006, and whether Respondent is liable for those violations. The evidence and testimony presented at hearing shows that Respondent was the source of waste and litter on the Site on March 22, 2006 and that Respondent had sufficient access and control over the Site to be held liable for the above violations under Illinois law.

[1] Despite Respondent's repeated statements to the contrary in its Post-Hearing Brief (Resp. Post-Hearing Br. at ¶¶ 2, 5, and 16), CDOE has not alleged, in its citation or at hearing, that Respondent was involved in salt unloading operations, asbestos-related violations, improper site security, waste next to residential homes, or oil flowing into the sewer.

ARGUMENT

A. Respondent is Liable for Violating Section 21(p)(1) of the Act as the Source of Waste and Litter on the Site on March 22, 2006.

Respondent is liable for causing or allowing open dumping that resulted in litter under Section 21(p)(1) of the Act because Respondent is the source or generator of waste and litter observed on the Site on March 22, 2006 and the Site was not a properly permitted sanitary landfill. In fact, Respondent admitted to formerly owning one significant piece of waste and litter that was on the Site on March 22, 2006. At hearing, Respondent's witness, Mr. Gonzalez, stated that Respondent was a "landscape company," (Tr. at 171.) and admitted that the "old tanker" on the Site "used to belong to the landscaping company." Tr. at 201. Mr. Gonzalez then admitted that the tanker "didn't pass the DOT inspection, so we basically have to cut it up and throw it away." *Id.* In its Post-Hearing Brief, Respondent argues that the tanker on the Site was being "stored pending a decision" and that it "could be fixed." Resp. Post-Hearing Br. at ¶ 4. Respondent also points to Mr. Gonzalez's testimony that the tanker would require an eight thousand dollar investment to pass DOT inspection. *Id.* Respondent's counsel neglected to include Mr. Gonzalez's entire statement regarding this eight thousand dollar investment, which was "I have to spend, like, eight grand to fix it, *and it's not even worth it.*" Tr. at 201 (emphasis added). More importantly, even if Respondent truly intended to re-use the tanker at some point in the future, this Board has repeatedly held that "respondents' claims of intended future uses are not determinative of whether the materials are waste or litter." *See IEPA v. Gruen*, AC 06-49 (IPCB Jan. 24, 2008); *IEPA v. Cadwallader,* AC 03-13 (IPCB May 20, 2004); *County of Sangamon v. Daily*, AC 01-16 (IPCB Jan. 10, 2002).

While finding that the respondent in the *Sangamon v. Daily* case had violated Section 21(p)(1) of the Act, this Board stated that "[w]hile [respondent] has expressed an intention to use every single discarded item on his property, *at the time of the two inspections involved herein, numerous items were not in use, were not useable in their current condition*, and were not stored in such a way as to protect any future use." *Sangamon v. Daily*, AC 01-16 (emphasis added). As Respondents' admissions above clearly demonstrate, the tanker was neither "in use" nor "useable in its current condition" on March 22, 2006 and it would have required a large investment (that Respondent evidently had no intention in making) to return it to use. Furthermore, as shown in CDOE's Post-Hearing Brief, the tanker qualifies as "waste" under Section 21(a) of the Act and "litter" under Section 21(p)(1) of the Act such that Respondent, as the former owner of the tanker, should be held liable for violating Section 21(p)(1) of the Act. Compl. Post-Hearing Br. at 4-5.

In addition to the old tanker, the evidence and testimony at hearing demonstrate that Respondent was the likely source or generator of other waste and litter on the Site on March 22, 2006. Specifically, there was compost material, wood, cinder blocks, fencing material, and mesh netting, which are all materials that are commonly used in the landscaping industry. *See* Compl. Ex. A at 6-11; Tr. at 19, 25-28, and 109-10. Moreover, Mr. Gonzalez's testified at hearing that Respondent stored a flatbed on the Site that was used in Respondent's landscaping projects. Tr. at 201. Although the flatbed and some of the other landscaping materials (e.g., the clean stones) most likely do not qualify as "waste" under the Act, Respondent's use of the Site to store non-waste materials demonstrates the degree to which Respondent had access to and control over

the Site – Respondent would require access to and control over the Site to retrieve these materials for use on off-site landscaping projects. The fact that Respondent is a landscaping company with access to and control over the Site supports a conclusion that the landscaping materials on the Site that do qualify as waste and litter were discarded there by Respondent. Therefore, Respondent should be found liable for violating Section 21(p)(1) for being a source of waste and litter observed on the Site on March 22, 2006.

B. Respondent is Liable for Violating Sections 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7)(i) of the Act Due to Respondent's Capability to Control the Site of Pollution.

As stated in CDOE's Post-Hearing Brief, Respondent is liable for the violations observed on the Site on March 22, 2006 because Respondent had the "capability to control the...site of pollution." *See IEPA v. Cadwallader,* AC 03-13 (IPCB May 20, 2004). Therefore, in addition to the tanker, landscape waste, and other litter directly attributable to the Respondent as shown above, the Respondent's capability to control the Site makes the Respondent also liable for the other open dumping violations observed on the Site on March 22, 2006: scavenging, open burning, waste standing in water, and the deposition of general construction or demolition debris.

In Respondent's Post-Hearing Brief, Respondent does not deny the existence of these specific violations on the Site on March 22, 2006, but claims that CDOE did not provide any evidence linking Respondent to the violations. As this Board has held, however, CDOE need not show that Respondent directly committed the alleged violations, but "must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." *Id.* Furthermore, Respondent's dumping of litter on the Site in violation of

Section 21(p)(1) could have encouraged others to engage in open dumping activities on the Site in violation of the Act. In *County of Jackson v. Donald Taylor*, AC 89-258 (IPCB Jan. 10, 1991), the respondent admitted to dumping some materials on the subject property, but denied committing the majority of the dumping or the open burning that was observed there. *Id.* In finding violations of Section 21(q) (now Section 21(p)), the Board found that the fact that respondent did not specifically allow the dumping or burning was not dispositive and that "the debris he placed on the property, may in fact have encouraged others to dump there." *Id.*

The Respondent also claims that the trucks observed on the Site on March 22, 2006 were cleaning the property, but the Board has repeatedly held that clean up efforts are not a defense under the Act. *See City of Chicago v. City Wide Disposal, Inc.*, AC 03-11 (IPCB Sept. 4, 2003); *County of Jackson v. Easton*, AC 96-58 (IPCB Dec. 19, 1996). As shown in CDOE's Post-Hearing Brief, Respondent admitted at hearing that there was waste on the Site on March 22, 2006 from off-site sources (whether from fly-dumpers, E. King, or Respondent's landscaping operations). Compl. Post-Hearing Br. at 2-3. Under Illinois law, the presence of off-site waste at a site lacking the proper permits is sufficient to find that open dumping and resulting violations have occurred. *Id.* Moreover, as this Board stated in *County of Jackson v. Easton*, "clean-up of the site is not a mitigating factor under the administrative citation program." Due to Respondent's capability to control the site where the violations were observed on March 22, 2006, Respondent should be found liable for violating Sections 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7)(i) of the Act.

CONCLUSION

Respondent is liable for violating Section 21(p)(1) of the Act because Respondent contributed to the waste and litter observed on the Site on March 22, 2006. In addition, Respondent is liable for violating Sections 21(p)(2), 21(p)(3), 21(p)(4), and 21(p)(7)(i) of the Act due to Respondent's capability to control the Site. Therefore, CDOE respectfully requests that the Board enter a final order finding that Respondent violated these sections and imposing the statutory penalty of $7500 ($1500 for each violation).

Respectfully submitted,

CITY OF CHICAGO
DEPARTMENT OF ENVIRONMENT

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By: _____
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Dated: May 13, 2008

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