

ILLINOIS POLLUTION CONTROL BOARD
May 10, 1990

ST. CLAIR COUNTY,)	
)	
Complainant,)	
)	
v.)	AC 89-18 (Dockets A & B)
)	(Administrative Citation)
J & R LANDFILL, INC.,)	County No. 89-1 SC
An Illinois Corporation,)	
)	
Respondent.)	

DENNIS HATCH APPEARED ON BEHALF OF THE OFFICE OF THE STATE'S ATTORNEY FOR ST. CLAIR COUNTY;

THOMAS J. IMMEL, OF IMMEL, ZELLE, OGREN, MCCLAIN, GERMERAAD & COSTELLO, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. C. Marlin):

This matter comes before the Board upon a petition for review of administrative citation ("citation") filed by J & R Landfill, Inc. ("J&R") on February 2, 1989. The citation was served on J&R on January 5, 1989, pursuant to the authority vested in the Illinois Environmental Protection Agency ("Agency") and delegated to St. Clair County ("Complainant") pursuant to Section 4(r) of the Illinois Environmental Protection Act ("Act") (Ill. Rev. Stat. 1987, Ch. 111½, par. 1001 et seq.).

The citation is based upon Complainant's determination of four violations of Section 21(p) of the Act, identified as Counts A, B, C, and D. Count A is based on the uncovered waste prohibition of Section 21(p)(5) as observed on November 28, 1988. Count B is based on the litter prohibition of Section 21(p)(12) as observed on December 1, 1988. Count C is based on the uncovered waste prohibition of Section 21(p)(5) as observed on December 2, 1988. Count D is based on litter prohibition of Section 21(p)(12) as observed on December 2, 1988. J&R contests all four determinations of violation.

On May 8, 1989, J&R filed a motion to dismiss for lack of jurisdiction due to improper service. The Board denied that motion by Order of May 11, 1989. Upon motion for reconsideration filed May 16, 1989, the Board granted reconsideration, but reaffirmed its denial of J&R's motion to dismiss by Order of June 22, 1989.

A hearing was held on September 13, 1989, in Sauget, St. Clair County, Illinois; no members of the public attended. Complainant presented witness Donald R. Brannon, supervising Environmental Specialist for the St. Clair County Health Department; Respondent present witness Avis K. Quirin, President and owner of J&R. The

parties elected to not file briefs, standing on their closing arguments¹.

BACKGROUND

The citation was issued to J&R as the operator of a sanitary landfill located in St. Clair County, operating under Agency Permit No. 1975-50-OP and designated with Site Code No. 1630100002. The facility is commonly known to the Agency as Belleville J & R.

On the basis of inspections conducted by Mr. Brannon on October 24, November 28, December 1, and December 2, 1988, Complainant determined that J&R had operated the site in violation of Section 21(p)(5) of the Act. On the basis of Mr. Brannon's inspections of November 28, December 1, and December 2, 1988, Complainant determined that J&R had operated the site in violation of Section 21(p)(12) of the Act. Complainant subsequently issued a citation on January 5, 1989 for two violations each of subsections (p)(5) and (p)(12) of Section 21. Complainant then noted that J&R is subject to a civil penalty of \$500.00 for each of the four violations for a total of \$2000.00. Sections 21(p)(5) and 21(p)(12) of the Act state:

- (p) 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:

* * *

- 5. uncovered refuse remaining from any previous operating day or at the conclusion of any operating day, unless authorized by permit;

* * *

- 12. failure to collect and contain litter from the site by the end of each operating day.

J&R now contests before this Board Complainant's determinations of violation, claiming that the determinations of violation were improper. In the alternative, J&R claims that the violations were the result of uncontrollable circumstances, thus invoking the "uncontrollable circumstances" provision of the Act:

. . . if the Board finds that the person appealing

¹Closng arguments are cited herein "Compl. R at ____" for Complainant, and :J&R". at ____" for J&R.

the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and imposes no penalty. Ill. Rev. Stat. 1987, ch. 111½, par. 1031.1(d)(2).

Penalties in actions of the type here brought are prescribed 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 (p) or (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. Ill. Rev. Stat. 1987, ch. 111½, par. 1042(b)(4).

COMPLAINANT'S DETERMINATIONS OF VIOLATION

The Board next turns to the four individual counts. For purposes of economy of discussion, Counts B and D will be treated together.

Uncovered Refuse - Count A

On October 24, 1988, Mr. Brannon inspected the J&R facility between 9:10 and 10:40 A.M. Mr. Brannon testified that on that date he observed uncovered refuse² on the eastern and northern slopes of the fill area (R. at 15). Complainant submitted photographs taken during the October 24 inspection (Exhs. 16-1, 18-1 and 19-1) which purport to show areas of uncovered refuse in gullies.

On November 28, 1988, Mr. Brannon conducted another inspection of the J&R facility. He testified that he photographed areas of uncovered refuse on the eastern slope of the fill, which he states is the same uncovered refuse which he observed on October 24, 1988. He testified to the contents of the photos under direct examination as following:

²In his testimony, Mr. Brannon used the terms "uncovered refuse" and "exposed refuse" interchangeably. The Board notes that the Act only uses the term "uncovered refuse".

- A. They depict exposed refuse.
- Q. The same sites one month apart?
- A. Correct.

Photograph 19-2 was taken farther back up the slope which explains a little bit the difference in the photographs but it is the same refuse.

- Q. People's Exhibits 18-1 and 21-2?
- A. This is exposed refuse that was on the eastern slopes. [Photograph] 21-2 was taken, again, a little farther away, and probably with a different lens as well, but you can see the two by four still laying in the gully, and you can recognize the refuse in the two pictures.

(R. at 20).

From this, Complainant argues that since the photographs and testimony indicate that the same refuse was exposed on October 24, 1988 and November 28, 1988, the refuse remained uncovered from a previous operating day in violation of Section 21(p)(5) of the Act.

J&R responds that the citation issued was improper and that no violation of Section 21(p)(5) has been shown. J&R states that photographs 21-2, 20-2, and 19-2, which were the basis for Complainant's determination of violation on November 28, 1988, depict a section of the landfill which was no longer active and had received final cover (R. at 83; J&R. at 132). Ms. Quirin testified that the drought of 1988 caused vegetation not to establish in the area, which in turn allowed erosion and exposure of the previously buried waste in the fall season (R. at 83).

Ms. Quirin further noted that correction of the gulleying is possible:

- Q. What steps, if any, have you taken to correct that?
- A. The only thing you can do is monitor it and keep filling the washouts with dirt.

(R. at 84)

Ms. Quirin additionally observed that Exh. 19-1 shows new cover material which had been placed near the gulleys for the alleged purpose of filling the gulleys (R. at 84-5).

J&R argues that Section 21(p)(5) does not apply because the refuse had been covered and the area had received final cover.

Therefore, J&R submits that the refuse had not remained uncovered from a previous operating day within the meaning of Section 21(p)(5).

The Board disagrees with J&R's interpretation. J&R would seemingly have Section 21(p)(5) read as a prohibition against "refuse remaining uncovered from any previous day". Under this interpretation, J&R's position is arguably correct in that the refuse at issue had not remained uncovered because it indeed had received a previous cover.

Essential to J&R's construction is that the word "uncovered" is employed as a past participle within the phrase "remaining from any previous operating day". However, the grammatical construction which J&R urges is not that which actually exists in the statute. Rather, the statute reads:

No person shall conduct a sanitary landfill operation manner which results in ... uncovered refuse remaining from any previous operating day ...

In this construction, the word "uncovered" is an adjective modifying "refuse" and the participial phrase "remaining from any previous operating day" serves as an adjective modifying the term "uncovered refuse". The proper question is thus whether the uncontestedly uncovered refuse is properly described as "remaining from any previous operating day". The answer to this question is clearly "yes". The refuse obtained its "uncovered" character on some previous day, and it remained in that form for many days thereafter.

Further guidance on this matter may be obtained through examination of the underlying Board regulation. As the Board has previously noted, there is a nexus between the Administrative Citation procedure of the Act and the Board regulations; this nexus is that the Administrative Citation procedure was designed to expedite the regular enforcement process by identifying a subset of the larger waste disposal regulations which may be prosecuted through the Administrative Citation procedure (In the Matter of: Dan Heusinkved, County Clerk, County of Whiteside, State of Illinois, AC 87-25, 85 PCB 247; In the Matter of: Village of Rantoul, AC 87-100, 92 PCB 539). Thus, the underlying regulation serves as guidance for actions covered in the citation procedure.

The underlying regulation at issue is found at 35 Ill. Adm. Code 807.305(a), which states in pertinent part that cover "shall be placed on all exposed refuse at the end of each day of operation" (emphasis added). In the matter at hand, exposed refuse clearly existed in the gulleys, and it was allowed to remain uncovered at the end of not only one operating day, but through at least the period from October 24, 1988 to November 28, 1988. The Board notes that Section 807.305(a) states all exposed refuse must

be covered. It makes no distinction as to the cause of the exposure (e.g., whether the refuse was newly disposed, or later uncovered due to erosion, operation of vehicles, digging of new trenches, scavenging, etc.)

In the alternative, J&R argues that the erosion and uncovered refuse was caused by "uncontrollable rainfall events." (J&R R. at 132). The Board finds this construction strained. While rainfall events are clearly "uncontrollable", and the gulleying caused by the rainfall events was arguably "uncontrollable"³, the persistence of uncovered refuse within the gullies was clearly not uncontrollable. It is the evidence of persistence of uncovered refuse upon which Complainant made its determination of violation, not the uncontrollability of the action which lead to the exposure of the refuse. It was well within the control of J&R to take some rectifying action, and to thereby meet its responsibility to cover refuse. In fact, J&R's witness offered one simple solution: fill the washouts with dirt (i.e., replace the cover removed by erosion). There is no evidence that this was done or even attempted in the time between the October 24 and November 28 inspections, the presence of nearby piles of cover material notwithstanding.

Based on the above, the Board upholds the Complainant's determination of violation of Section 21(p)(5) for November 28, 1988, and finds that the violation was not the result of uncontrollable circumstances.

Uncovered Refuse - Count C

Mr. Brannon also inspected the J&R facility on December 1, 1988 between 3:50 and 4:25 PM, and again on December 2, 1988 between 5:20 and 7:15 AM. During the first of these two inspections Mr. Brannon observed and photographed (Exhs. 7-3 and 8-3) what he considered to be uncovered refuse located at the toe of the active face (R. at 29). On the second of the two inspections, Mr. Brannon again observed and photographed (Exhs. 4-4 and 6-4) the same area. Mr. Brannon testified that the December 2 photographs likewise show uncovered refuse from a previous operating day (R. at 29-30). On the basis of the photographs and inspections, Complainant issued the citation for violation of Section 21(p)(5) occurring December 2, 1988.

J&R responds with several observations and conclusions. These are that J&R's extended working hours somehow cause an unusual

³The Board notes that the record does not indicate the magnitude of the offending rainfall events. Neither does the record indicate when the rainfall events occurred, other than that by inference they preceded October 24, 1988, a date on which the gullies caused by the rainfall events were in evidence.

standard of cover application to apply at its facility, that cover material had been and was being applied in the areas photographed during inspection, and that such failure of cover as may have existed was due to the poor ground and weather conditions occurring at the time of inspection. The Board addresses these in turn.

The J&R facility is permitted to maintain gate hours of 7:00 AM to 5:00 PM on weekdays, and 7:00 AM to noon on Saturdays (R. at 57). That J&R's operating hours, in the sense of the hours it is open to the public, are less than 24-hours a day is further affirmed by Ms. Quirin under direct examination:

Q. You asked the Illinois Environmental Protection Agency to extend the hours to which you were open to the public, correct?

A. Yes.

Q. They adjusted your hours at one time, is that right, for you?

A. I don't believe they did.

Q. Okay. Did they deny your request to go for a twenty-four hour a day operation?

A. Yes.

Q. Was that request to be open to the public twenty-four hours a day?

A. Yes.

(R. at 124-125)

Nevertheless, J&R implies that it is somehow a 24-hour a day operation (R. at 58, 98). The Board fails to see how this conclusion is reached, since although J&R continually alludes to this conclusion, it never coherently lays out a rationale in support. The Board can only presume that J&R bases its characterization on the fact that employees sometimes work into the night, even though this is not necessarily always the case nor does the night work necessarily extend throughout the night (See R. at 117-119). The Board fails to see how this raises J&R's operation to a "24-hour a day operation".

Assuming arguendo that J&R's operation is somehow properly characterized as a 24-hour a day operation, the Board still fails to see where this characterization reaches. J&R seemingly implies that since J&R workers sometimes work late into the night, perhaps even sometimes around the clock, J&R's "operating day" has no end, the phrase "at the conclusion of any operating day" of Section

21(p)(5) has no meaning as applied to J&R's operations, and J&R is thereby exempt from the daily cover requirements of Section 21(p)(5). This position is patently untenable in the context of Section 21(p)(5). Section 21(p)(5), as well as the general Board regulation found at 35 Ill. Adm. Code 807.305, is premised on covering refuse as soon as is practicable, and certainly does not excuse failure to cover simply because persons may have been on the property on a continuous basis. If anything, the presence of nighttime operators would seem to allow expanded opportunity to meet the cover obligation, rather than stand as basis for excusing it.

J&R further notes that cover material was being applied in the areas photographed during the December 1, 1988 inspection. This fact was supported by Mr. Brannon (R. at 55). However, J&R argues that due to rainfall occurring around the dates of inspection, the cover material was wet and therefore difficult to apply, thus presumably causing some refuse to remain uncovered into the next day. J&R also noted that under those conditions refuse protrudes through cover material even though six inches of cover is applied and that this is unavoidable (R. at 93-95). J&R's witness testified that there had been "much rainfall" between November 28 and December 1 (R. at 89), but no other evidence was introduced to indicate how much rain had fallen. J&R argues that because this wet cover problem is unavoidable, the violation was the result of uncontrollable circumstances (J&R at 135-136).

Mr. Brannon conceded that refuse may still protrude and be visible although six inches of cover has been applied (R. at 66-69):

- A. You can have something poking out and still comply with the regulations. The regulation says you should have six inches of compacted cover. . . . When you inspect a landfill you could tell whether or not it is adequately covered. You don't have to count paper, look at pieces of paper. You can go on a landfill and there can be paper sticking out in a lot of areas but you would not charge them with inadequate cover...

(R. at 68-69)

However, Mr. Brannon did not believe J&R had applied adequate cover to the areas he observed on December 2 (R. at 66-69). Complainant argues that J&R did not present sufficient evidence that "the conditions were so bad that [J&R] could not do anything about it", but only stated that it rained (Compl. R. at 142).

The Board notes that J&R appears to be initially asserting that adequate cover was applied, hence the determination of violation was improper, and that the appearance of a lack of cover was due to the wet conditions, which were uncontrollable. The Board first addresses whether the record supports a finding that

uncovered refuse remained from any previous operating day. Although photographs 8-3 (taken December 1) and 6-4 (taken December 2) show that some cover had been applied to portions of the refuse piles, other refuse appears untouched. Photographs 7-3 (taken December 1) and 4-4 (taken December 2) show uncovered refuse in an area where some cover had been applied, yet some uncovered refuse is visible in the same location in both sets of photographs, indicating no cover had been applied to some refuse during the intervening period. The Board therefore finds that the record supports the determination of violation of Section 21(p)(5) on December 2, 1988, in that some refuse deposited on or before December 1, 1988 remained uncovered on December 2, 1988.

The Board now turns to the issue of whether the violation was due to uncontrollable circumstances. The Board finds that J&R has shown that it was difficult to cover refuse with wet cover material and under wet conditions, and that some of the refuse material may continue to be visible though six inches of cover may be applied. However, the record discloses that some refuse remained totally uncovered from a previous operating day. J&R has failed to show that the allowing of this refuse to remain uncovered from a previous operating day was due to uncontrollable circumstances. The record sufficiently shows that daily cover could be placed in spite of conditions, and shows that some cover had in fact been applied.

Here, refuse remained uncovered from a previous operating day and J&R has not shown that the violation of 21(p)(5) was due to uncontrollable circumstances. Therefore, the Board upholds the finding of violation of Section 21(p)(5) occurring December 2, 1988.

Litter - Counts B and D

Complainant registers two counts of violation of Section 21(p)(12), failure to collect and contain litter from the site by the end of each operating day. These two counts, B and D, are based on Mr. Brannon's inspections of November 28 and December 1 and 2, 1988.

Mr. Brannon testified that on November 28, 1988 he observed litter on the top portion of the site (R. at 22), as depicted in photographic Exhibit 14-2. Mr. Brannon further testified that on December 1, 1988 and again on December 2, 1988 he observed the same litter that he had seen on November 28, 1988 (R. at 24). The latter two occurrences of litter are depicted in photographic Exhibits 10-3 and 7-4, respectively. The Board notes that these photographs show litter on the ground and in vegetation, some of which is the same litter as that depicted in photographs taken November 28 and December 1.

J&R does not dispute the existence of the litter (R. at 116-117). Rather, J&R contends that the litter remained due to uncontrollable circumstances. Ms. Quirin testified that the persons she employs to pick up litter could not walk through the area of the landfill photographed by Mr. Brannon because of mud, water, and frozen ground (R. at 91, 123), and that she had also tried to walk in that area and became stuck in the mud (R. at 88). She said that this was due to much rain that had fallen between November 28 and December 1, 1988 (R. at 89). She also said that she observed the litter pieces in the area and that they were frozen "to the ground and grass there" (R. at 87-89). She further described the soil conditions as wet, frozen, and cold (R. at 91). She said litter pickers attempted to pick litter between November 28 and December 1, and again on December 2, 1988, and that they did not collect litter in the area photographed, only collecting litter in the active area (R. at 91). Ms. Quirin further described the situation:

A. ...[W]henver it is really muddy and raining and it's cold, they will not go up there. You cannot go up there and pick it up when it's that cold. (R. at 123)

Respondent argues on the basis of Ms. Quirin's testimony that the litter depicted in the December 1 and 2 photographs was stuck and frozen into the weeds and grass and that the area was impassable from mud. Therefore, J&R submits that the violations on December 1 and 2, 1988 were due to uncontrollable circumstances (J&R. at 133-134).

The inspection report of December 1, 1988 indicates that weather conditions were clear and sunny with the approximate temperature 45 degrees, and soil conditions were muddy in low areas. The inspection report of December 2, 1988 indicates that the weather conditions were clear and sunny with the approximate temperature 27 degrees (See also R. at 70).

Upon examination of the record, the Board finds that J&R's facility was operated in a manner which resulted in failure to collect and contain litter from the site by the end of any operating day, and that such violations occurred December 1 and 2, 1988.

The Board next addresses the issue of uncontrollable circumstances. J&R has shown that it was generally not possible for litter pickers to walk in the area in question due to muddy conditions. These conditions were worsened by the area's topography which retained water and remained muddy longer than the rest of the site. J & R has also shown that at other times some or all of the litter became frozen in place and could not be picked up by hand. These conclusions are amply supported by the pictorial record. While adverse weather will not normally excuse an operator

from compliance with these provisions (see Heusinkved, supra) the particular circumstances in this situation warrant a finding of uncontrollable circumstances. In Heusinkved, the complainant rebutted the landowners contentions by submitting evidence that the ground in question was workable. (85 PCB 252) Here, J & R's testimony has gone largely unrebutted.

Based on the foregoing, the Board finds that, while the alleged violations of Section 21(p)(12) on December 1 and December 2, 1988 occurred, respondent has demonstrated the violations were due resulted from uncontrollable circumstances; pursuant to Section 31.1(d)(2) of the Act, the Board makes no finding of violation and imposes no penalty for Counts B and D.

DOCKET B

Pursuant to Section 42(b)(4) of the Act, any person found to have violated Section 21(p) of the Act is required to pay hearing costs incurred by the Board and by the agency which issued the administrative citation. The Clerk of the Board and Complainant will therefore be ordered to each file a statement of costs (supported by affidavit) with the Board and with service upon J&R. 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) By majority vote of the Board, Respondent, J & R Landfill, Inc., is hereby found to have been in violation of Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1021(p)(5) on November 28 and December 2, 1988 as alleged in Counts A and B. The Board finds that the violations alleged in Counts B and D were due to uncontrollable circumstances. Respondent is, therefore, subject to a statutory penalty of \$1,000.
- 2) Within 45 days of this Order of May 10, 1990 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 Services Division
2200 Churchill Road
Springfield, IL 62706

- 3) Within 45 days of this Order of May 10, 1990 Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the Landfill Citation Fund. Such payment shall be sent to:

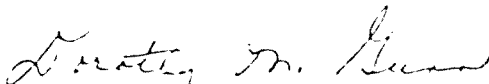
Paul Haas
County Collector
#10 Public Square
Belleville, IL 62220

- 4) Docket A in this matter is hereby closed.
- 5) Within 30 days of this Order of May 10, 1990 St. Clair County shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Respondent. 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 Respondent. Such filings shall be entered in Docket B of this matter.
- 6) Respondent is hereby given leave to file a reply/objection to the filings as ordered in 4) within 45 days of this Order of May 10, 1990.
- 7) Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 $\frac{1}{2}$ 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. The Board finds no violation of Ill. Rev. Stat. ch. 111 1/2, par. 1021(p)(12).

IT IS SO ORDERED.

J. Dumelle, M. Nardulli and J. Anderson dissented as to the findings of violation of Section 21(p)(5) of the Act on November 28, 1988 (Count A). J.T. Meyer, R. Flemal and B. Forcade dissented as to the finding of no violation of Section 21(p)(12) of the Act on December 1 and 2, 1988 (Counts B and D).

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of May, 1990, by a vote of 7-3 with respect to Count A, a vote of 4-3 with respect to Count B, a vote of 7-0 with respect to Count C, and a vote of 4-3 with respect to Count D.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board