

ILLINOIS POLLUTION CONTROL BOARD
March 16, 1995

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 94-73
)	(IEPA No. 415-94-AC)
STACY B. HESS,)	(Administrative Citation)
)	
Respondent.)	

MELANIE A. JARVIS, ASSISTANT COUNSEL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

STACY B. HESS APPEARED PRO SE.

INTERIM OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board pursuant to a petition for review of an administrative citation timely filed by respondent, Stacy B. Hess, on September 16, 1994. Respondent requested review of an administrative citation issued by the Illinois Environmental Protection Agency (Agency) on August 16, 1994 and filed with the Board on August 18, 1994. The Environmental Protection Act (Act) allows parties 35 days from the date of service of an administrative citation in which to appeal. (415 ILCS 5/31.1 (b)(4)(1992).) The Board accepted the petition for review on October 6, 1994 and set the case for hearing. Hearing was held before Hearing Officer Deborah Frank on January 26, 1994 in Washington, Illinois. No post-hearing briefs were filed.

The administrative citation alleges a single violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1)) which carries a statutory civil penalty of \$500 if the Board finds that such a violation occurred. For the reasons set forth below, the Board affirms the finding of the Agency that respondent, Stacy B. Hess, has violated Section 21(p)(1). The Board finds respondent liable for \$500 and any associated hearing costs incurred by the Agency and the Board.

FACTS

Stacy B. Hess is the present owner and operator of the site in question, located in the County of Tazwell. (Tr. at 7.) The site is commonly known to the Agency as the Washington/Hess Property (Complaint at 1) and was previously a used car/truck/tire/tractor junkyard (Tr. at 8 and 29). The site does not have an Agency Operating Permit and is designated by Site Code No. 1798180017. (Complaint at 1.) The administrative

citation alleges that Mr. Hess violated Section 21(p)(1) of the Act by causing or allowing open dumping in a manner which resulted in litter.

The administrative citation is based upon a June 20, 1994 inspection of the site by Robert Eugene Figge. Mr. Figge is employed by the Agency primarily as a field inspector. (Tr. at 6.) Mr. Figge also inspected the site on two prior occasions, May 9, 1990 and September 29, 1992¹.

According to Mr. Figge there were approximately three thousand tires on the site during his 1990 inspection. (Tr. at 8.) As a result of that inspection, on June 13, 1990 the Agency sent an Administrative Warning Notice to Mr. Hess. (Tr. at 9 - 10; Pet. Exhibit 1.) Mr. Hess replied on July 11, 1990 and listed the actions he intended to undertake to remove the tires. (Tr. at 10; Pet. Exhibit 2).

Between 1990 and 1992 Mr. Hess transported most of the tires to the Archer Daniels Midland facility in Decatur to burn as tire derived fuel. (Tr. at 8.) Approximately fifteen hundred tires remained at the site at the time of the September 29, 1992 inspection. (Tr. at 9.) Thereafter, on October 27, 1992 the Agency sent Mr. Hess an Enforcement Warning Notice alleging apparent violations of Section 21(a), 21(d), 21(p), 55(a), 55(c), 55(d), and 55.6(b) of the Act, and 35 Ill. Adm. Code 848.202(b) and 848.202(c). (Pet. Exhibit 3.) The Agency received Mr. Hess's response dated November 9, 1992 which included documentation of tire disposal, general questions about the enforcement notice proceeding and responses Mr. Hess claimed to have previously sent to the Agency. (Tr. at 12; Pet. Exhibit 4.) Mr. Figge testified that he had not seen the attached letters (dated February 17, 1992 and July 11, 1990) prior to receiving Mr. Hess's November 23, 1992 initial response. (Tr. at 12.) The Agency replied on December 8, 1992 and requested a more specific timetable for tire removal, and informed Mr. Hess that "while tires on rim are not addressed under Part 848 of the Regulations or Section 55 of the Act they are still considered a solid waste as per Section 21(p) of the Act". (Pet. Exhibit 5.) The Agency and Mr. Hess continued correspondence until the June 20, 1994 inspection. (Tr. at 13 - 14.)

¹ During the hearing (Tr. at 11), Mr. Figge refers to his second inspection of the site as occurring on June 29, 1990 and June 29, 1992. The Board assumes he is referring to the September 29, 1992 inspection because there is no documentation of any inspection occurring at the site on June 29, 1990 or June 29, 1992.

The administrative citation at issue is a result of the third and final inspection conducted by Mr. Figge. At hearing Mr. Figge testified that no substantial change had taken place at the site between the 1992 and 1994 inspections. (Tr. at 9; see also Tr. at 15.) According to the narrative attached to the administrative citation, and as supported by the twelve photographs taken during the June 20, 1994 inspection of the site, approximately fifteen hundred tires remained scattered around the property. The majority of the tires were tractor tires on the rim. (Narrative at 1.)

Mr. Hess testified to many reasons why the site was in the condition it was: he was doing the best he could to remove the tires (Tr. at 30), 1993 was one of the wettest years on record and the tires are located on low land (Tr. at 30; Pet. for Review), he planned to ask for an extension to remove the tires (Tr. at 30; Pet. for Review), his full-time job required him to work twelve to eighteen hours seven days a week since June, 1994 (Tr. at 30-31), he has had to farm seven hundred acres of corn and soybeans (Pet. for Review), and he inherited the problem because the tires were on the property when he bought it. (Tr. at 36; Pet. for Review).

DISCUSSION

The Act establishes that in order to seek enforcement by way of the administrative citation process for violations of Section 21(p), the Agency must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted in litter, open burning, or other specified conduct at the dump site. If the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty. The only mitigation of a violation is if "...the person appealing the citation has shown that the violation resulted from uncontrollable circumstances", in which case the Board shall adopt an ordering which imposes no penalty. (415 ILCS 5/31.1(d)(2) (1992).)

The administrative citation issued against Mr. Hess alleges that Section 21(p) subsection (1) of the Act was violated. Section 21(p)(1) provides that no person shall in violation of Section 21(a) of the Act:

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;

(415 ILCS 5/21(p)(1) (1992).)

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".

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.

(415 ILCS 5/3.24 (1992).)

Section 3.31 of the Act defines "refuse" as "waste". (415 ILCS 5/3.31 (1992).) Section 3.53 of the Act defines "waste" as, inter alia, "garbage...or other discarded material, including solid, liquid, industrial, commercial, mining and agricultural operations, and from community activities..." (415 ILCS 5/3.53 (1992).)

In St. Clair County v. Louis Mund (August 22, 1991), AC 90-64, 125 PCB 381, the Board adopted the definition of "litter" contained in the Litter Control Act:

"litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle...or 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)[415 ILCS 105/3.]

Mr. Hess was the owner of the property at the time of the June 20, 1994 inspection at issue in this administrative citation. It is irrelevant that he was not the owner of the property when the Agency initially began its investigations in 1990.

The twelve photographs taken by Mr. Figge during the June 20, 1994 inspection reveal many tires on and off the rim. (Tr. at 16-22; Site Photographs 1-12.) Mr. Hess offered no testimony or evidence to contradict the accuracy of Mr. Figge's photographs or interpretation of the site. At hearing Mr. Hess admitted that approximately fifteen hundred tires were on the site (Tr. at 37) during the June 20, 1994 inspection.

However, throughout the hearing and during correspondence with the Agency, Mr. Hess argues that the tires on site are not

in violation because the majority of the tires are on the rim. Mr. Hess cites to the Used Tires provisions of the Act (415 ILCS 5/53 (1992)) for the definition of "used tire" and "tire storage site", as well as for legislative intent. (Tr. at 34 - 36.) In contrast to these Sections of the Act, the administrative citation at issue does not allege violations of the Used Tires provisions of the Act. It alleges violations of Section 21(p) of the Act, open dumping resulting in litter. At hearing Melanie Jarvis asked Mr. Hess whether he knew he was cited "under the litter section of the Act, 21(p), and not under the disposal of tires?" to which Mr. Hess replied in the affirmative. (Tr. at 41.) Ms. Jarvis clearly testified that the Agency had filed a complaint of a violation of Section 21(p) of the Act. (Tr. at 45-46.)

The Agency did not allege a violation of the Used Tires provisions of the Act and was under no obligation to do so under these circumstances. The tires are litter alleged to be in violation of 21(p). This is not an issue of first impression before the Board. Used tires have been found to be litter in violation of Section 21(p)(1)² in five previous Board opinions: IEPA v. Sickles, (September 17, 1992) AC 92-47, 136 PCB 83; IEPA v. Sickles, (July 30, 1992) AC 92-47, 135 PCB 223; IEPA v. Hillebrenner, (May 21, 1992) AC 92-16, 133 PCB 559; IEPA v. Loveless, (August 13, 1992) AC 91-31, 135 PCB 367; and IEPA v. Springman, (May 9, 1991) AC 90-79, 122 PCB 147. In Hillebrenner, the litter included 500 tires in a ravine on rural property. (Hillebrenner, 133 PCB 559.) In Springman, a portion of the litter was an uncovered tire pile. (Springman, 125 PCB 151.) In Loveless, Hammond, and Sickles, used tires were merely among the litter found "open-dumped" on the site during inspection. (Loveless, 135 PCB 371; Hammond, Slip Op. at 2; and Sickles, 135 PCB 223 and 136 PCB 83.) In Hammond infra, the Board affirmed the Agency's issuance of an administrative citation for "open dumping" of used tires and other various types of waste at a junkyard. The tires at the site were rimmed and unrimmed, and located without cover in haphazard piles around the property. (See generally, Hammond, Slip Op. at 2.)

The Agency is not prohibited from alleging used tires on a site are waste resulting in litter in violation of Section 21(p) simply because there exists another provision in the Act which addresses used tires ((415 ILCS 5/53 (1992))). The Agency clearly choose to file an administrative citation alleging violations of Section 21(p) of the Act and to identify the discarded used tires as litter in that citation.

² Section 21(p)(1) was formerly codified as Section 21(q)(1) and therefore a number of the cases are brought under Section 21(q)(1).

Therefore, after reviewing the evidence, the Board finds that open dumping of waste occurred on the property resulting in litter in violation of Section 21(p)(1) of the Act.

PENALTY AND COSTS

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).)

In the Board's final order in this case, respondent will 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, respondent is also required to pay hearing costs incurred by the Board and the Agency. Those costs are not contained in the record at this time. Therefore as part of this interim order, the Clerk of the Board and Agency are ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon respondent.

This interim opinion constitutes the Board's interim findings of fact and conclusions of law in this matter. A final order will be issued pursuant to the interim order which follows.

INTERIM ORDER

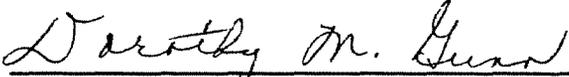
1. Respondent, Stacy B. Hess, is hereby found to have violated 415 ILCS 5/21(p)(1) (1992) on June 20, 1994.
2. The Illinois Environmental Protection Agency is hereby directed to file a statement of its hearing costs, supported by affidavit, with the Board and with service on the respondent, Mr. Stacy Hess, within 14 days of this order. Within the same 14 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 respondent, Mr. Stacy Hess.

3. Respondent, Mr. Stacy Hess, is hereby given leave to file a reply to the filings ordered in paragraph 2 within 14 days of receipt of that information, but in no case later than 40 days after the date of this order.
4. After the deadline for filing such information and reply thereto has expired, the Board will issue a final order assessing the statutory penalty, and making the appropriate award of costs.

IT IS SO ORDERED.

Board Member J. Yi concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 16th day of March, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board