

ILLINOIS POLLUTION CONTROL BOARD
June 4, 2009

COUNTY OF JACKSON,)
)
 Complainant,)
) AC 09-8
 v.) (Administrative Citation)
)
 DAN KIMMEL,)
)
 Respondent.)

DANIEL BRENNER, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF THE COUNTY OF JACKSON; and

DAN KIMMEL APPEARED *PRO SE*.

INTERIM OPINION AND ORDER OF THE BOARD (by S.D. Lin):

Today the Board finds that Dan Kimmel (Kimmel or respondent) violated Sections 21(p)(1) and (p)(7) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2006)). The violations, alleged in a complaint issued by the County of Jackson (County) occurred at respondents' property, known to the County as the De Soto/Dan Kimmel Site, Code No. 0778035009, and located north of De Soto in a rural, unincorporated portion of Jackson County. The Board finds that respondent violated the Act by causing or allowing the open dumping of waste resulting in litter, and unlawful deposition of general and/or clean construction and demolition debris.

After finding the violations in this interim opinion and order, the Board directs the County and the Clerk of the Board to file hearing cost documentation, to which respondents may respond. After the time periods for the hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

In this interim opinion and order, the Board first describes the administrative citation process, the procedural history, and the facts of this case. The Board then sets forth the pertinent provisions of the Act, and summarizes the arguments of the parties as proffered in post-hearing briefs. Next, the Board analyzes the issues and makes its conclusions of law regarding the alleged violations, before then addressing the issue of penalties. Finally, after finding the violations, the Board directs the County and the Clerk of the Board to provide hearing costs documentation, to which respondent may object. After the time periods for the hearing costs filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the Illinois Environmental Protection Agency (IEPA) and units of local government to enforce specified provisions of the Act through an administrative citation (AC). 415 ILCS 5/31.1 (2006). The IEPA, or a unit of local government which is a delegated authority by IEPA, must serve the AC on the respondent within “60 days after the date of the observed violation,” (415 ILCS 5/31.1(b) (2006)) and must file a copy of the AC with the Board no later than ten days after serving the respondent. 415 ILCS 5/31.1(c) (2006). To contest the AC, the respondent must file a petition with the Board no later than 35 days after being served with the AC. If respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(2) (2006); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the AC, but the complainant proves the alleged violations at hearing, the respondent will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. 415 ILCS 5/42(4, 4-5)(2006). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed, (*e.g.* 415 ILCS 5/42(b)(1-3)), Section 42 sets specific penalties for administrative citations. 415 ILCS 5/42(4, 4-5)(2006). Thus, in cases such as this the Board has no authority to consider mitigating or aggravating factors in its determination of penalty amounts. *Id.* However, “if the Board finds that the person appealing the [administrative] citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.” (415 ILCS 5/31.1(d)(2) (2006)).

PROCEDURAL HISTORY

On July 30, 2008, the County timely filed with the Board an administrative citation and served the citation on Dan Kimmel on July 25, 2008. Respondents filed a timely petition for review to contest the citation on August 27, 2008. The Board accepted respondent’s petition on September 16, 2008 and directed the hearing officer to set a hearing date.

On December 4, 2008, Board Hearing Officer Carol Webb conducted a hearing (Tr.) at the Jackson County Courthouse in Murphysboro. Assistant State’s Attorney Daniel Brenner appeared on behalf of the County, and presented the testimony of Mr. Don Terry, an environmental compliance inspector with the Jackson County Health Department. Tr. at 4-5. Dan Kimmel appeared *pro se*, and presented testimony on his own behalf. *Id.* Hearing Officer Webb determined that the three witnesses that testified at the hearing were credible (Tr. at 18), and admitted two exhibits into evidence. Tr. at 10.

On January 9, 2009, the County filed a post-hearing brief (Comp. Br.); respondent did not file a brief.

FACTS

On July 8, 2008, County Field Inspector Don Terry inspected Site No. 0778035009, owned by respondent Dan Kimmel. Citation at 1-2; *see also* County Narrative Inspection Report

(Field Report) at 1. The Jackson County Health Department has been delegated authority by IEPA to conduct such inspections, and Mr. Terry is has been certified by the IEPA as an inspector for nonhazardous solid waste management sites. Tr. at 6.

At hearing, Mr. Terry testified concerning his observations during the inspection, and the County entered as exhibits the site sketch attached to Mr. Terry's inspection report filed with the citation and the photographs attached to the inspection report (Gr. Ex. 1), as well as Mr. Terry's affidavit and open dump inspection checklist prepared during the inspection (Gr. Ex. 2).

The July 8, 2008 inspection was made as a follow up to an inspection conducted on December 7, 2005. The site includes Mr. Kimmel's residence, as well as land surrounding it. The estimated volume of waste present at the site was 645 cubic yards, located in three general areas shown on the inspector's site sketch contained in the report and labeled areas A, B, and C. During the inspection, waste items observed included, but were not limited to:

in Area A: door, abandoned vehicles, pickup truck bed tops, an abandoned camper, scrap metal, a truck trailer with part of its side missing, a mobile home lying on its side (Gr. Ex. 1, Site Sketch Area A, Photos 1-11);

in Area B: scrap metal, abandoned vehicles (a car and a school bus), vehicle parts, plumbing fixtures, metal shelving, furniture, PVC pipe, plastic items, metal gas cylinders, a truck trailer open at both ends and other materials too numerous to list (Gr. Ex. 1, Site Sketch Area B, Photos 12-20); and

in Area C: metal gas cylinders, plastic items, scrap metal, plywood, dimensional lumber, glass windows and other items too numerous to list (Gr. Ex. 1, Site Sketch Area B, Photos 21-25).

In his inspection report, Mr. Terry stated that the items he observed at the site

were not in use and were not stored in such a way as to protect any future use. The items observed were also stored in an unsightly manner and were generally over grown with vegetation which would seem to indicate that the materials had not been used at least during this current growing season. Gr. Ex. 2, Site Narrative at 2.

Mr. Terry did not believe that any of the vehicles on site were capable of being driven, and had been unused for at least 7 days. Tr. at 10-11. Mr. Terry stated that he had inspected the site three or four times (Tr. at 11), and that on earlier occasions Mr. Kimmel had told him that he had brought all of the materials to the site:

He just said that, you know, he was using the material, was recycling it, was you, in the process of trying to get the place cleaned up. *Id.*

Mr. Terry also testified that an administrative citation had been issued against the property in 2006. The administrative citation itself notes that, as a result of a previous site

inspection on November 6, 2006, Kimmel was found guilty of a violation of Section 21(p)(1) (415 ILCS 5/21(p)(1) (2006) in County of Jackson v. Dan Kimmel, AC 06-21 (Nov. 2, 2006). Citation at 1-2.

Mr. Terry testified that he did not believe that any of the violations observed July 8, 2008 were a result of “uncontrollable circumstances”. Tr. at 11.

In his testimony, Mr. Terry added that the debris onsite could be seen with a naked eye from the public road. Tr. at 11. Mr. Kimmel questioned whether all of the material could be seen from the road, and Mr. Terry clarified that he could see some of it. Tr. at 13. Mr. Kimmel also asked whether Mr. Terry had made a follow-up inspection since July 2008 to see whether the site had been cleaned up, and Mr. Terry responded that he had not. Tr. at 13-14.

SUMMARY OF RESPONDENTS’ TESTIMONY

At hearing, respondent Dan Kimmel testified that he had been at the site since 1988. Tr. at 16. He testified that a lot of the items on site had been there since then, but that some had not. Mr. Kimmel testified that he had made progress in cleaning up the site:

There is some stuff still on the ground, but [if Mr. Terry] had come back few days ago he could have seen that we were making good effort to clean this mess up. You ain’t going to clean up 20 years of stuff – and it is not landfill. I don’t care what you people call it. It is scrap iron, scrap iron. It’s just good scrap iron for the most part other than that old house that blew up. *Id.*

Mr. Kimmel stated that he felt that other people in the area had “junk” that could be seen from the road, and that he felt he was being harassed by the inspector. Tr. at 16-17.

STATUTORY BACKGROUND

Section 3.305 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 5/3.305 (2006).

Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2006).

Section 3.535 of the Act defines “waste” as:

any garbage, . . . or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.135, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act . . . 415 ILCS 5/3.535 (2006).

Section 21(a) of the Act states that “[n]o person shall [c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a) (2006).

Section 21(p) of the Act provides in relevant part:

No person shall:

(p) 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;

(7) deposition of:

(i) general construction or demolition debris as defined in Section 3.160(a) of this Act; or

(ii) clean construction or demolition debris as defined in Section 3.160(a) of this Act.

The prohibitions specified in this subsection (p) shall be enforceable by the . . . by administrative citation under Section 31.1 of this Act . . . ”415 ILCS 5/21(p)(1), (p)(7) (2006)).

COMPLAINANT’S BRIEF

In its post-hearing brief, the County states that the evidence establishes that open dumping has occurred at the Kimmel property, resulting in litter and improper deposition of general construction and demolition debris in violation of Sections 21(p)(1) and (p)(7) of the Act. Comp. Br. at 1. The County observes that Mr. Kimmel generally admitted to the existence of waste at the site, both at hearing (Tr. at 16), and in his petition for review. Comp. Br. at 1. The County maintains that the evidence clearly shows that Mr. Kimmel caused or allowed the deposition of the waste and construction and demolition debris on the site, and that it is uncontested that respondent owned and controlled the site at all material times. The County contends that the only defenses raised by Mr. Kimmel—the assertions that he is cleaning up, and that he is being harassed—do not excuse the alleged violations. Comp. Br. at 2-3.

Respondent’s Written Remarks

As previously stated, Mr. Kimmel did not file a post hearing brief. However, his petition for review contains a narrative description of his position of the type often found in a post hearing brief.

In his petition for review, Mr. Kimmel stated that:

The complaint I have received from the pollution control board States that my land is an open dump which I believe is completely wrong. I consider it as merely recycling. I have recycled many Items and I have collected many recyclable materials in the past 20 years because I have never believed in filling our land fills with these items for the sake of the environment.

In the past two years the pollution control board has been on my back to clean it up *and* I have continually made efforts to do so in the way of storage facilities and also bringing load after load to the recycling center as quickly as possible.

Mr. Don Terry was out at the property and was taking pictures. In his report he has documented all the things that I haven't gotten to yet. He failed to report the hard work that I have put in to clean; he also failed to take pictures of the improvements that I have worked so hard to get done.

Collecting these materials for 20 years will take some time to clean up. I am only one man with limited machinery to help me and I am trying my best to get this issue resolved. I also have a full-time job so I can only work on this after putting in a hard day at my job and every weekend, but there are only so many hours in a day and I do need sleep.

Therefore, I am asking for adequate time to get everything hauled off and put everything that I want to keep in a building or undercover so that I no longer have this trouble with the pollution control board. I have numerous receipts from the scrap yards to prove that I have been hauling in scrap continually. I also pay for a large dumpster that I'm continually filling with non-recyclable garbage in my effort to comply to this issue.

BOARD DISCUSSION

In opening its discussion, the Board notes that facts of this case are uncontested. Mr. Kimmel acknowledges that he has accumulated the various materials that are on his property, and does not assert that the accumulation was a result of "uncontrollable circumstances" within the meaning of Section 31.1(d)(2) of the Act. 415 ILCS 5/31.1(d)(2).

"Open Dumping" of "Waste"

The record shows that County Field Inspector Terry observed and photographed numerous and varied items at the site including a door, abandoned vehicles (including a car and a school bus), pickup truck bed tops, an abandoned camper, scrap metal, one truck trailer with part of its side missing and another open at both ends, a mobile home lying on its side; vehicle parts, scrap metal, plumbing fixtures, metal shelving, furniture, PVC pipe, plastic items, metal gas cylinders, metal gas cylinders, plastic items, plywood, dimensional lumber, glass windows and other items too numerous to list (Gr. Ex. 1, Site Sketch Area B, Photos 21-25). Tr. at 9-13.

The field report and photographs reveal that these materials were strewn across the site and overgrown by brush and trees (Field Report, photos 7-12, 14, 18, 21-24), and endured prolonged exposure to the elements. *Id.*, photos 7, 9, 11-13, 15-17, 19-24. In similar factual scenarios, the Board has found that such visual evidence is proof of a lack of intent to use materials in the future. Stutsman, at 7; *see also*, IEPA v. Carrico, AC 04-27, slip op. at 7, (Sept. 2, 2004).

The Board finds that the various abandoned vehicles, vehicle parts, furniture, plastic items, and other materials constitute “any garbage...or other discarded material” (415 ILCS 5/3.535 (2006)), and that the respondent has consolidated refuse. While the Board appreciates that Mr. Kimmel finds it offensive to have his land referred to as “an open dump”, it is undisputed that the site does not meet the requirements of a sanitary landfill. Therefore, the Board finds that “waste” has been “open dumped” at the site. Mr. Kimmel does not dispute that he has amassed the collection of materials on the site, and so the Board also finds that respondent caused or allowed the open dumping of waste as defined under Section 21(a) of the Act.

The Board next addresses the specific provisions of Section 21(p) allegedly violated by the respondent, and finds that the open dumping of waste at the site did result in litter.

Litter

Although the Act does not define “litter,” previous Board decisions defined litter using the statutory definition in the Illinois Litter Control Act, wherein litter is “any discarded, used, or unconsumed substance or waste. ‘Litter’ may include, but is not limited to, any garbage, trash, refuse, debris, rubbish...or anything else or an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly.” 415 ILCS 105/3(a) (2006). *See St. Clair County v. Louis I. Mund*, PCB 90-64, (Aug. 22, 1991); *see also*, 415 ILCS 105/3(a) (2006).

The record is clear that on July 8, 2008, the site contained a door, abandoned vehicles (including a car and a school bus), pickup truck bed tops, an abandoned camper, scrap metal, one truck trailer with part of its side missing and another open at both ends, a mobile home lying on its side; vehicle parts, scrap metal, plumbing fixtures, metal shelving, furniture, PVC pipe, plastic items, metal gas cylinders, metal gas cylinders, plastic items, plywood, dimensional lumber, glass windows and other items too numerous to list (Gr. Ex. 1, Site Sketch Area B, Photos 21-25). Tr. at 9-13. The Board finds that these materials fall within the definition of “litter” (415 ILCS 105/3(a) (2006)) and that the respondents violated Section 21(p)(1) of the Act.

General and/or Clean Construction and Demolition Debris

The Act defines “construction or demolition debris” in Section 3.160. Among other things, the statutory definition includes wood, plumbing fixtures, glass, plastics and piping. *See* 415 ILCS 5/3.160(a). Mr. Kimmel does not dispute that these materials were included in the materials on his property. The Board accordingly finds that respondent violated Section 21(p)(7) of the Act.

Alleged Defenses of Recycling, Site Cleanup and County Failure to Cite Others

The Board notes that Mr. Kimmel has raised as general defenses, without citation to authority, that he is in the process of recycling the materials on site and in the process of site cleanup and that others in his area have not received similar administrative citations.

As to the issue of recycling, the Board has long held that even if a person claims that some material at the site has value and could be recycled, that the person must have more than a speculative plan to recycle it in the future, and the material must be properly protected from the elements. *See, e.g., IEPA v. Mark Gates*, AC06-50, slip op. at 7 (April 2, 2009), and cases cited herein.

As to the other asserted defenses, the County has correctly pointed out that neither can be considered here. As the Board has recently observed,

the administrative citation was created by statute with clearly delineated procedures and defenses as a streamlined way in which to enforce the Illinois Environmental Protection Act. *See* 35 Ill. Adm. Code 108 *et seq.* Citizens' due process rights are protected by the strict timeframes both for service of process of the citation on the alleged violator and for filing the citation with the Board, and by the clearly mandated content requirements for each citation. 35 Ill. Adm. Code 108.202, 108.204. Furthermore, the legislature defined narrow parameters for contesting an administrative citation, limited to questions of ownership of the property at issue, whether the alleged violator caused or allowed the alleged violations; whether the citation was timely served; and, whether the alleged violations resulted from uncontrollable circumstances. 35 Ill. Adm. Code 108.206. *IEPA v. Bobby G. Myers and Donald D. Myers*, AC 07-30, slip op. at 11 (May 21, 2009).

Under the administrative citation programs, the Board has no authority to issue administrative citations, or discretion to consider clean-up efforts as grounds to dismiss an administrative citation once the Board finds that a violation has occurred. *See, e.g. City of Chicago v. City Wide Disposal Inc.*, AC 03-11 (Sept. 4, 2003). The County, on the other hand, has great prosecutorial discretion as to who it chooses to cite, and when it chooses to cite them. The County may choose to consider such efforts in determining whether to issue an administrative citation against one or more potentially liable persons, *IEPA v. Bobby G. Myers and Donald D. Myers*, AC 07-30, slip op. at 11 (May 21, 2009), or to dismiss one or more counts of an administrative citation it issues. *County of Jackson v. Dan Kimmel*, PCB 06-21 (Nov. 2, 2006) (assessing \$1,500 violation for violation of Section 21(p) (1) only, as alleged violation of Section 21 (p) (7) dismissed from complaint as part of settlement).

Civil Penalties and Hearing Costs

Because Mr. Kimmel violated Sections 21(p)(1), and (p)(7) of the Act on July 6, 2008, and those violations were not the result of uncontrollable circumstances, the Board now discusses civil penalties and hearing costs. Both are addressed in Section 42(b)(4-5) of the Act:

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 \$1,500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency, except that the civil penalty amount shall be \$3,000 for each violation of any provision of subsection (p) of Section 21 that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2006).

The Board agrees, as the County asserts, that this is Mr. Kimmel's second violation of Section 21(p)(1) only. County of Jackson v. Dan Kimmel, PCB 06-21(Nov. 2, 2006). As this is Mr. Kimmel's second adjudicated violation of Section 21 (p)(1), the statutory penalty is \$3,000 for this violation. As to Section 21 (p)(7), because this is respondent's first adjudicated violation, the statutory penalty is \$1,500. So, in its final order the Board will order Mr. Kimmel to pay a total civil penalty of \$4,500.00 plus costs.

As to costs, the Board directs the County and the Clerk of the Board to file hearing cost documentation, to which Kimmel may respond. After the time periods for the filings on hearing costs have run, the Board will issue a final opinion and order imposing civil penalties and assessing appropriate hearing costs.

CONCLUSION

After reviewing the record in this case and the relevant portions of the Act, the Board finds that the respondent caused or allowed the opening dumping of waste resulting in litter and unlawful deposition of construction or demolition debris. Therefore, the Board finds that the respondent violated Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1) and (p)(7) (2006). In its final order, the Board will order respondent to pay a civil penalty of \$4,500.00. As set forth below, the Board directs the Clerk and the County to document hearing costs and serve them upon respondent, after which the Board will issue a final order. See 35 Ill. Adm. Code 108.502, 108.504, 108.506.

This interim opinion and order constitutes the Board's finding of fact and conclusions of law.

ORDER

1. The Board finds that Dan Kimmel violated Sections 21(p)(1) and (p)(7) of the Act.
2. The County of Jackson must file a statement of its hearing costs within 30 days of this order, on or before July 8, 2009, the first business day after the 30th day after this order. The statement must be supported by affidavit and served upon respondents. 35 Ill. Adm. Code 108.502. Within the same 30-day period, the Clerk of the Illinois Pollution Control Board must also file and serve upon

respondents a statement of the Board's hearing costs supported by affidavit. See 35 Ill. Adm. Code 108.504, 108.506(a).

3. Respondent may file any objections to those statements within 21 days of service of those statements, by a date on or about July 29, 2009. 35 Ill. Adm. Code 108.506(a). The County may then file a reply to the respondent's response within 14 days of service of that response. 35 Ill. Adm. Code 108.506(b).
4. The Board will then issue a final order assessing a statutory penalty of \$4,500.00 for the violations and awarding appropriate hearing costs. 35 Ill Adm. Code 108.500(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on June 4, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board