

ILLINOIS POLLUTION CONTROL BOARD
February 16, 2012

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 11-13
)	(IEPA No. 305-10-AC)
RAY NEWINGHAM,)	(Administrative Citation)
)	
Respondent.)	

MICHELLE M. RYAN APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

RAY NEWINGHAM APPEARED *PRO SE*.

INTERIM OPINION AND ORDER OF THE BOARD (by J.A. Burke):

On November 10, 2010, the Illinois Environmental Protection Agency (Agency) filed an administrative citation against Ray Newingham (respondent). The administrative citation involves respondent's property located at the southeast corner of the intersection of Worchester and Clay Streets in Roodhouse, Greene County, and designated by the Agency with Site Code No. 0610355023. The Board finds that respondent violated Sections 21(p)(1) and (p)(7) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2010))¹ by causing or allowing open dumping of waste resulting in litter and deposition of construction or demolition debris. Respondent is subject to statutorily-mandated civil penalties of \$1,500 per violation, for a total fine of \$3,000.

Respondent must also pay the hearing costs of the Agency and the Board. After finding the violations in this interim opinion and order, the Board directs the Agency and the Clerk of the Board to provide documentation of hearing costs, to which respondent may respond. After the time period for filing hearing costs expires, 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 Agency to enforce specified provisions of the Act through an administrative citation. 415 ILCS 5/31.1 (2010). The Agency must serve the administrative citation on the respondent within 60 days after the date of the observed violation.

¹ As there have been no meaningful substantive changes in the statutory language from prior versions of the Act (2006, 2008) in the provisions at issue, the Board's order will refer to the most current version.

415 ILCS 5/31.1(b) (2010); 35 Ill. Adm. Code 108.202(b). The Agency also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. 415 ILCS 5/31.1(c) (2010). To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. 415 ILCS 5/31.1(d) (2010). If the respondent timely contests the administrative citation, but the Agency proves the alleged violations at hearing, the respondent will be held liable for the civil penalty as well as the hearing costs of the Board and the Agency. *See* 415 ILCS 5/42(b)(4-5) (2010). Because the Act specifies the penalty for a violation in an administrative citation action, the Board cannot consider mitigating or aggravating factors when determining penalty amounts. *Id.* However, if the Board finds that the respondent “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) (2010).

PROCEDURAL HISTORY

On November 10, 2010, the Agency filed an administrative citation (Citation) against respondent. The Agency served the citation on respondent on November 8, 2010. On December 29, 2010, the Board received respondent’s petition (Petition) to contest the administrative citation. Attached to the petition was a letter written by respondent (Letter) and a portion of a newspaper titled “Building Collapses in Roodhouse.” The petition was timely filed because it was postmarked on the filing deadline of December 13, 2010. The Board accepted the petition for review on January 6, 2011.

Board Hearing Officer Carol Webb held a hearing at the City Hall in Carrollton, Green County, on November 2, 2011. Charlie King, an Agency inspector, testified at the hearing. One exhibit was admitted into the record: the Agency’s inspection report dated September 16, 2010. Hearing Transcript (Tr.) at 13-14.

The hearing officer set a schedule for filing post-hearing briefs requiring the Agency to file a brief by November 28, 2011 and respondent to file a brief by December 12, 2011. The Agency filed its brief (Agency Br.) on November 28, 2011. Respondent did not file a post-hearing brief.

FACTS

On September 16, 2010, an Agency inspector observed, walked, and photographed respondent’s property. Citation at 1; Affidavit of Charlie King attached to Citation (King Affidavit) at ¶ 3. The Agency inspector prepared an inspection report (Report), including twenty-one photographs. King Affidavit at ¶ 4; Tr. at 8-9. At the time of the inspection, the property surface was damp. Report at 1. The Agency inspector observed: demolition waste, a television, a two-gallon compressed gas cylinder, conduits, metals, plastics, bricks, wood, wire, asphalt, dirt, tires, household refuse, a toilet, a saw blade, a metal desk, plaster, drywall, a fan, a mattress, a sink, a PVC pipe, a corrugated hose, shingles, insulation, and carpet. *Id.* at 2-3. The Agency inspector estimated that the property contained 1800 cubic yards of waste. *Id.* at 1. The

Agency inspector took twenty-one photographs showing the aforementioned materials. *Id.* at 2-3, 5-15; Tr. at 9-13.

Respondent also provided facts about the property. Respondent “had taken over this property with plans to rebuild.” Petition at 1. The building collapsed approximately two to three months after respondent acquired the property. *Id.* Respondent removed five dumpsters of materials, 65 tons of bricks, and three to four loads of scrap metal. Letter at 1. Respondent states that “two-thirds of what was there has been removed.” *Id.* Respondent “cleaned out part of one basement and put dirt in it.” *Id.* Also, “the dirt that is there was hauled in to put in the basement after we cleaned it out.” *Id.*

PARTIES’ ARGUMENTS

Agency’s Position

The Agency argues that respondent violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2010)) by causing or allowing the open dumping of waste resulting in litter and deposition of construction and demolition debris. Agency Br. at 1. Respondent owned the property “since before the buildings there collapsed in 2009.” Agency Br. at 2.

The Agency notes that “open dumping” means “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 (2010)). Agency Br. at 1. Using statutory definitions of “refuse” and “waste,” the Agency argues that a television, bricks, compressed gas tanks, electrical components and conduit, pipe, plastics, metals, a vehicle battery, a road warning saw horse, wood pallets, wire, asphalt, a toilet, a saw blade, a metal desk, plaster, drywall, a fan, a mattress, a kitchen sink, a corrugated hose, used tires, shingles, insulation, and carpet were present at the property and constitute “discarded material” within the meaning of the term “waste.” Agency Br. at 2-3.

The Agency notes that the Board uses the definition of “litter” found in the Litter Control Act (415 ILCS 105/3(a) (2010)). Agency Br. at 2. According to the definition and supporting case law, the materials found on the property constitute litter. *Id.* Because these items were found at the property, the Agency asserts that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2010)). *Id.*

The Agency notes the definition of “construction or demolition debris” in the Act and argues that the bricks, electrical components and conduit, pipe, plastics, metals, wire, toilet, plaster, drywall, kitchen sink, corrugated hose, shingles, insulation, and carpet found at the site meet the definition. The Agency contends that this debris observed by the Agency inspector constitutes a violation of Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2010)). Agency Br. at 2-3.

The Agency notes that respondent claims the collapse of the building was not within his control. Agency Br. at 3. The Agency states that the collapse occurred on May 28, 2009 and the inspection was on September 16, 2010. *Id.* The Agency argues that these approximately 15

months were “plenty of time to address the problems,” which respondent did not do. *Id.* The Agency further argues that the collapse does not provide a defense because a person can cause or allow a violation of the Act without knowledge or intent. *Id.*, citing County of Will v. Utilities Unlimited, Inc. et al., AC 97-41, slip op. at 5 (July 24, 1997), citing People v. Fiorini, 143 Ill.2d 318, 574 N.E.2d 612 (1991).

Respondent’s Position

Respondent did not appear at hearing and did not file a post-hearing brief, so the Board will summarize the defenses that respondent argued in his petition for review. Respondent makes two arguments. First, respondent argues that a building collapsed on the property and this collapse was an uncontrollable circumstance. Petition at 1. Second, respondent contends that he has financial difficulties that are delaying cleaning up the debris. *Id.*; Letter at 1.

DISCUSSION

The Agency alleges that respondent violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing open dumping of waste in a manner resulting in litter (415 ILCS 5/21(p)(1) (2010)) and in a manner resulting in deposition of construction or demolition debris (415 ILCS 5/21(p)(7) (2010)). Citation at 2.

Section 21(p) of the Act prohibits any person from causing or allowing open dumping in a manner which results in litter or the deposition of general construction or demolition debris as defined in Section 3.160(a). 415 ILCS 5/21(p)(1), (7)(i) (2010).

Open Dumping

To prove a violation of Section 21(p) of the Act, the Agency must first prove that respondent violated Section 21(a) of the Act by causing or allowing open dumping of waste. *See IEPA v. Shrum*, AC 05-18, slip op. at 7 (Mar. 16, 2006). 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 (2010). “Refuse” means “waste” (415 ILCS 5/3.385 (2010)) and “waste” includes “garbage . . . or other discarded material . . .” (415 ILCS 5/3.535 (2010)).

The Agency inspector observed and photographed varied items on the property on September 16, 2010 including a television, bricks, compressed gas tanks, electrical components and conduit, pipe, plastics, metals, a vehicle battery, a road warning saw horse, wood pallets, wire, asphalt, a toilet, a saw blade, a metal desk, plaster, drywall, a fan, a mattress, a kitchen sink, a corrugated hose, used tires, shingles, insulation, and carpet. Report at 2-3. Various inspections revealed that the debris was present and mostly unchanged during inspections on November 20, 2009, May 7, 2010, and September 16, 2010. *Id.* at 1. The September 16, 2010 inspection “revealed some minor cleanup, inasmuch as a few pallets were on-site with stacked bricks on them.” *Id.* In addition, the inspector observed gravel, asphalt, and used tires not previously present at the property. *Id.* The inspector also noted piles of dirt and asphalt which

“appear to have been brought in from off-site” and were not present during prior inspections. *Id.* at 2; Tr. at 11-12. Respondent later arranged to dispose of some debris and requested additional time to finish cleaning up the property. Letter at 1.

The condition of the debris, the length of time the debris remained on the property, as well as respondent’s intention (or lack thereof) to dispose of the debris, leads the Board to find that the materials found at the property constitute “any garbage . . . or other discarded material” (415 ILCS 5/3.535 (2010)) and, therefore, are waste. The Board finds that this waste has been consolidated at the property from “one or more sources” (415 ILCS 5/21(a) (2010)). It is undisputed that the property does not meet the requirements of a sanitary landfill. Therefore, the Board finds that “waste” has been “open dumped” at the property in violation of Section 21(a) of the Act.

Litter

The Act does not define “litter,” however, previous Board decisions defined litter using the statutory definition in the Illinois 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 . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly.

415 ILCS 105/3(a) (2010); *see St. Clair County v. Louis I. Mund*, PCB 90-64, slip op. at 4, 6 (Aug. 22, 1991).

On September 16, 2010, the property contained discarded materials such as a television, bricks, compressed gas tanks, electrical components and conduit, pipe, plastics, metals, a vehicle battery, a road warning saw horse, wood pallets, wire, asphalt, a toilet, a saw blade, a metal desk, plaster, drywall, a fan, a mattress, a kitchen sink, a corrugated hose, used tires, shingles, insulation, and carpet. Report at 2-3. The Agency inspector estimated that the property contained 1800 cubic yards of waste. *Id.* at 1. The Board finds that these materials fall within the definition of “litter” (415 ILCS 105/3(a) (2010)) and that Respondent violated Section 21(p)(1) of the Act.

Deposition of General Construction or Demolition Debris

The Act defines “general construction or demolition debris” in part as:

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed or other asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical

wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials. 415 ILCS 5/3.160(a) (2010).

On September 16, 2010, the property contained bricks, electrical components and conduit, pipe, plastics, metals, wire, a toilet, plaster, drywall, a kitchen sink, a corrugated hose, shingles, insulation, and carpet. Report at 2-3. A building collapsed on the property in 2009. Petition; Tr. at 9; Agency Br. at 3. These materials constitute general construction or demolition debris within this definition. The Board therefore finds that respondent violated Section 21(p)(7) of the Act by causing or allowing the open dumping of waste in a manner resulting in the deposition of general construction or demolition debris.

Respondent's Defenses

Respondent asserts that the collapse of a building on the property was an “uncontrollable circumstance.” Petition at 2. If the Board finds that respondent “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) (2010). This defense is available only where the violation resulted from uncontrollable circumstances. IEPA v. Brown, AC 04-82, slip op. at 9 (May 19, 2005).

Here, the Board finds no such uncontrollable circumstances. The materials on the property appear to be primarily demolition wastes from a building which collapsed in May 2009. Report at 3; Letter at 1; Tr. at 9; Agency Br. at 3. Inspections on November 20, 2009, May 7, 2010, and September 16, 2010 showed that the debris was largely unchanged. Report at 1. Even if the building collapse was unexpected (which the Board cannot determine based on the record presented), the presence of the debris on the property for over fifteen months does not constitute an uncontrollable circumstance. In addition, some materials noted by the inspector may have been discarded at the property after the building collapsed, such as dirt, gravel, asphalt, and used tires. Report at 2; Tr. at 11-12.

Further, respondent stated that he was having financial difficulties in cleaning up the property. Letter at 1. The Board previously has held that lack of financial resources to remove waste from a site is irrelevant to the statutory defense of “uncontrollable circumstances.” IEPA v. Hill, AC 09-40, slip op. at 10-11 (October 7, 2010) (lack of financial resources to remove waste is not an “uncontrollable circumstance”). Similarly, the Board finds that respondent’s lack of financial resources is irrelevant to the defense of uncontrollable circumstances.

Civil Penalties and Hearing Costs

Because the Board finds that respondent violated Sections 21(p)(1) and (p)(7) of the Act on September 16, 2010, and those violations were not the result of uncontrollable circumstances, the Board now discusses civil penalties and hearing costs, as set forth in Section 42(b)(4-5) of the Act (415 ILCS 5/42(b)(4-5) (2010)).

In an administrative citation action under Section 31.1 of the Act, any person found to have violated any subsection of Section 21(p) of the Act shall pay a civil penalty of \$1,500 for

each subsection violated, except that the civil penalty amount shall be \$3,000 for each violation of any subsection of Section 21(p) that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2010).

The Board finds that the violations in the citation were respondent's first violations. Therefore, the statutory penalty will be \$1,500 for each violation of the Act. Respondent violated Sections 21(p)(1) and (p)(7), therefore his total penalty will be \$3,000.

The Board directs the Agency and the Clerk of the Board to file hearing costs documentation, to which respondent may respond within 21 days after service of the claimed costs. 35 Ill. Adm. Code 108.506(a). 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 respondent caused or allowed the opening dumping of waste resulting in litter and deposition of construction and demolition debris. Therefore, the Board finds that respondent has violated Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), (p)(7) (2010). In its final order, the Board will order respondent to pay a civil penalty of \$3,000. The Board directs the Clerk and the Agency to document hearing costs and serve them upon respondent, after which the Board will issue a final order. 35 Ill. Adm. Code 108.502, 108.504, 108.506.

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

ORDER

1. The Board finds that Ray Newingham violated Sections 21(p)(1) and (p)(7) of the Illinois Environmental Protection Act.
2. By March 5, 2012, the first business day after the 30th day following the date of this order, the Illinois Environmental Protection Agency must file a statement of its hearing costs, supported by affidavit and served on respondent. 35 Ill. Adm. Code 108.502. By the same date, the Clerk of the Illinois Pollution Control Board must also file a statement of the Board's hearing costs, supported by affidavit and served on respondent. 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. 35 Ill. Adm. Code 108.506(a).
4. The Agency 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).

5. The Board will then issue a final order assessing a statutory penalty of \$3,000 for the violations and awarding appropriate hearing costs. 35 Ill. Adm. Code 108.500(b).

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 16, 2012, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board