

ILLINOIS POLLUTION CONTROL BOARD

February 16, 2006

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 04-77
	)	(IEPA No. 265-04-AC)
FRANK BENCIE,	)	(Administrative Citation)
	)	
Respondent.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by G.T. Girard):

The Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against Frank Bencie (respondent) alleging that respondent violated Section 21(p)(1) and (p)(4) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) and (p)(4) (2004)). The administrative citation was issued for alleged violations occurring at 10220 Bencie Lane south of West Frankfort, Franklin County. For the reasons discussed below, the Board finds that respondent did violate Section 21(p)(1) and (p)(4) of the Act (415 ILCS 5/21(p)(1) and (p)(4) (2004)) and that a fine of \$3,000 must be assessed. Further, the Agency and the Board are directed to file statements of hearing costs within 14 days of this order so that those costs too may be assessed against respondent.

**PROCEDURAL HISTORY**

On May 14, 2004, the Agency timely filed an administrative citation (AC) against Frank Bencie. On June 15, 2004, Frank Bencie timely filed a petition to contest the administrative citation. The Board accepted the petition for review on July 8, 2005.

A hearing was held before Board Hearing Officer Carol Webb on November 17, 2005 (Tr.). At that hearing Mr. Douglas Hayward, an inspector with the Agency, and Mr. Frank Bencie testified. Tr. at 7, 13. The hearing officer set a schedule for filing of briefs requiring the Agency to file a brief by December 22, 2005, and a reply if any by January 19, 2006. Tr. at 21. The Hearing Officer directed respondent to file a brief by January 12, 2006. *Id.* The Agency timely filed a brief that the Board received on December 27, 2005. Respondent has not filed a brief.

**FACTS**

Respondent owns a facility located at 10220 Bencie Lane, south of West Frankfort in Franklin County. AC at 1. The facility is an open dump without an Agency operating permit, designated with the site code No. 0558045002. *Id.* On March 23, 2004, Mr. Hayward inspected the facility. *Id.*; Tr. at 8.

The property is several acres with a house and several other buildings on the property. Tr. at 9. The property contains a lot of open space with debris. *Id.* Mr. Hayward took several pictures of the property, but did not actually enter the property. *Id.* The pictures were taken from a north boundary road, traveling east to west over a distance of about 500 or 600 feet. Tr. at 9, 10. The pictures show waste materials ranging from wood and insulation to used tires and unidentifiable waste. Tr. at 9-10; AC at photos 1-22. In particular, one picture shows plastic shelving and wood in standing water. Tr. at 10; AC at photo 9. Waste with vegetation and overgrowth around the waste can also be seen in pictures of the property. Tr. at 10.

Mr. Bencie testified on his own behalf and indicated that he was cleaning up the property. Tr. at 13. Mr. Bencie stated that he is 57 years old and has health issues. *Id.* He has been performing the cleanup mostly by himself with the help of a local student who also recently became ill. *Id.* Since the inspection he has been regularly cleaning up the site and estimated that 65 to 70 % of the items have been removed. Tr. at 15. However, Mr. Bencie concedes that tires have been dumped on the site since the inspection and that there is grass growing on top of some of the waste. Tr. at 16, 17-18.

### **STATUTORY BACKGROUND**

Section 21(p) of the Act prohibits any person from causing or allowing open dumping in a manner which results in the following occurrences at the dump site:

- (1) litter;  
\*\*\*
- (4) deposition of waste in standing or flowing waters. 415 ILCS 5/21(p)(1),  
(4) (2004).

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 (2004).

Section 3.53 of the Act defines “waste” as, among other things, “garbage . . . or other discarded material. . . .” 415 ILCS 5/3.53 (2004).

It is well established that the Board accepts the definition of litter as that found in the Litter Control Act. St. Clair County v. Louis I. Mund, AC 90-64 (Aug. 22, 1991). Section 3 of the Illinois Litter Control Act provides:

“Litter” means any discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, debris . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly. 415 ILCS 105/3(a) (2004).

Section 31.1 of the Act allows the respondent to appeal the Agency’s issuance of an administrative citation within 35 days of the service of the administrative citation. 415 ILCS

5/31.1 (2004). Under Section 31.1(d)(2) of the Act, if the Board finds that the violations occurred and were not the result of uncontrollable circumstances, the Board must enter an order finding the violation and assessing the statutory penalty. 415 ILCS 5/31.1(d)(2) (2004). Statutory penalties for administrative citations are set in the Act, and the Board has no leeway to consider mitigating or aggravating factors in determining penalty amounts. *See* 415 ILCS 5.42(b)(4-5) (2004).

### **DISCUSSION**

Respondent's initial petition and testimony at hearing is the only evidence presented by respondent in defense of the alleged violations of Section 21(p)(1) and (4) of the Act (415 ILCS 5/21(p)(1) and (4) (2004)). The Board finds that respondent's evidence is insufficient to support a finding for respondent in this case.

The only statutory defense to an administrative citation is that the violations were the result of uncontrollable circumstances (*see IEPA v. John Groff*, AC 05-20 (Oct. 20, 2005)). The only other defense is that the violations did not occur (*see IEPA v. Omer Thomas*, AC 89-215 (Jan. 23, 1992)). In *Thomas*, the Board stated:

Pursuant to Section 31.1(d)(2) of the Act, if the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty. Respondent has two defenses to an administrative citation. The first is to show that the violation did not occur; the second that it occurred but was due to uncontrollable circumstances. [415 ILCS 5/31.1(d)(2)]. *Thomas*, AC 89-215.

A review of the record clearly establishes that the violations were not the result of uncontrollable circumstances and the violations did occur. Mr. Bencie's testimony does suggest that he might not have control over all the dumping (*see* Tr. at 16). However, Mr. Bencie also concedes that he has accepted waste because he doesn't "mind hauling it off." *Id.* Thus, while Mr. Bencie may be asserting some circumstances where the dumping was beyond his control, he does concede that some of the dumping on his property was done with his permission. Therefore, the Board finds that a defense of uncontrollable circumstances must fail.

Furthermore, the pictures are uncontroverted and Mr. Bencie concedes that the waste was present on his property (Tr. at 13). Therefore, Mr. Bencie admits that refuse has been consolidated on his property and "open dumping" occurred at the site. Next, the pictures, inspection report, and testimony of Mr. Hayward all establish that discarded materials are on the property and some of those materials are in standing or flowing waters. Thus, open dumping leading to litter and disposition of waste in flowing or standing water has occurred at the site. Therefore, the Board finds that the alleged violations did occur and respondent violated Section 21(p)(1) and (4) of the Act (415 ILCS 5/21(p)(1) and (4) (2004)).

### **CONCLUSION**

Based on the record before the Board, the Board finds that respondent violated Section 21(p)(1) and (4) of the Act (415 ILCS 5/21(p)(1) and (4) (2004)) by causing or allowing the open dumping of wastes on his property resulting in litter and the deposition of waste in flowing or standing water.

The civil penalty for violating Section 21(p) Act (415 ILCS 5/21(p) (2004)) is \$1,500 for a first offense and \$3,000 for a second or subsequent offense, plus hearing costs. 415 ILCS 5/42(b)(4-5) (2004); 35 Ill. Adm. Code 108.500(a). Because there are two violations of Section 21(p) of the Act (415 ILCS 5/21(p) (2004)) and these violations are the first offense, the total civil penalty is \$3,000. Further, because a hearing was held in this proceeding, respondent is also liable for hearing costs. Therefore, the Board and the Agency must file a statement of costs with the Clerk within 14 days of this order.

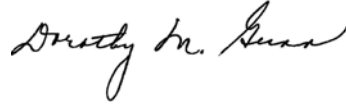
This interim opinion constitutes the Board's findings of fact and conclusions of law. A final order will be issued pursuant to the interim order that follows

### **ORDER**

1. The Board finds that respondent Mr. Frank Bencie violated Section 21(p)(1) and (4) of the Environmental Protection Act (415 ILCS 5/21(p)(1) and (4) (2004)) at his property in located at 10220 Bencie Lane, south of West Frankfort in Franklin County.
2. The Illinois Environmental Protection Agency and the Clerk of the Board must each file a statement of their hearing costs within 14 days of the date of this order, or by March 2, 2006. Each statement must be supported by affidavit and served on Mr. Bencie.
3. The Board gives Mr. Bencie leave to respond to the statements of hearing costs ordered in paragraph 2 of this order within 21 days after service of that information. 35 Ill. Adm. Code 506(a). The Agency may then file a reply to Mr. Bencie response within 14 days after service of the response. 35 Ill. Adm. Code 506(b).
4. The Board will then issue a final order assessing a statutory penalty of \$3,000 for the violation and awarding appropriate hearing costs. 35 Ill. Adm. Code 500(b).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 16, 2006, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board