

ILLINOIS POLLUTION CONTROL BOARD
March 1, 2007

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) AC 05-47
) (IEPA No. 686-04-AC)
STACY HESS,) (Administrative Citation)
)
Respondent.)

MICHELLE M. RYAN, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

STACY HESS APPEARED *PRO SE*.

INTERIM OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On January 20, 2005, the complainant, the Illinois Environmental Protection Agency (Agency), filed an administrative citation against the respondent, Mr. Stacy Hess. The citation alleges that Mr. Hess violated Sections 21(p)(1), (p)(3), and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2004)) at a site with plat description T26N-R3-2W, SE 1/4 of Section 13, located off of Route 24 East in Washington, Tazewell County. For the reasons below, the Board finds that Mr. Hess violated the Act as alleged by allowing the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris.

Mr. Hess is therefore subject to a statutory civil penalty of \$1,500 for each of the three violations, totaling \$4,500, and must 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 hearing cost documentation, to which Mr. Hess may respond. After the deadlines for these hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and any appropriate hearing costs.

In this interim opinion, the Board first describes the administrative citation process, followed by the procedural history and the facts of this case. The Board then sets forth the pertinent provisions of the Act and describes the parties' arguments. Next, the Board analyzes the issues and reaches its conclusions of law regarding the alleged violations. Finally, the Board addresses civil penalties and hearing costs.

ADMINISTRATIVE CITATION PROCESS

Under the Act, an administrative citation is an expedited enforcement action brought before the Board seeking civil penalties that are fixed by statute. Administrative citations may be filed only by the Agency or, if the Agency has delegated the authority, by a unit of local government, and only for limited types of alleged violations at sanitary landfills or unpermitted open dumps. *See* 415 ILCS 5/3.305, 3.445, 21(o), 21(p), 31.1(c), 42(b)(4), 42(b)(4-5) (2004); 35 Ill. Adm. Code 108.100 *et seq.*

The Act provides that the civil penalty is \$1,500 for each violation of each provision of Section 21(p). *See* 415 ILCS 5/42(b)(4-5) (2004). The penalty amount increases to \$3,000 for each of a respondent's second or subsequent adjudicated violation of each provision of Section 21(p). *Id.*; *see* 35 Ill. Adm. Code 108.500(a)(2). As 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 in these cases. *See* 415 ILCS 5/42(4-5) (2004).

A respondent issued an administrative citation may pay the civil penalty or challenge the administrative citation by petitioning the Board. *See* 415 ILCS 5/31.1(d) (2004). If the respondent does not succeed at hearing, the Board must impose on the respondent the civil penalty, as well as the hearing costs of the Board and the complainant. *See* 415 ILCS 5/42(b)(4), 42(b)(4-5) (2004); 35 Ill. Adm. Code 108.500(b).

PROCEDURAL HISTORY

On January 20, 2005, the Agency filed the administrative citation (AC) with the Board. On February 10, 2005, Mr. Hess filed a letter that the Board construed as a petition for review of the administrative citation. In an order dated February 17, 2005, the Board accepted that filing as timely but found that it did not fully comply with the Board's procedural rules. *See* 35 Ill. Adm. Code 108.206. In that order, the Board directed Mr. Hess to amend his petition to include his grounds for appeal within 30 days or face dismissal. On March 14, 2005, Mr. Hess filed a letter to the Agency that the Board construed as an amended petition for review (Am. Pet.). In an order dated March 17, 2005, the Board accepted the amended petition for hearing.

On November 14, 2006, Board Hearing Officer Carol Webb conducted a hearing (Tr.) at the City Hall in Pekin. At hearing, Special Assistant Attorney General Michelle M. Ryan appeared and participated on behalf of the Agency. Tr. at 5. Mr. Hess appeared on his own behalf. Tr. at 5. Two witnesses testified at hearing: Mr. R. Eugene Figge of the Agency (Tr. at 6-16) and Mr. Hess (Tr. at 17-25). The hearing officer admitted four exhibits (Exh.) into evidence. Tr. at 14, 21. Based on her legal judgment, experience, and observations at hearing, Hearing Officer Webb found that both witnesses testified credibly. Tr. at 26.

On December 28, 2006, the Agency filed its post-hearing brief (Comp. Brief). Mr. Hess filed his post-hearing brief (Resp. Brief) on February 1, 2007.

FACTS

On December 21, 2004, Agency environmental protection specialist R. Eugene Figge inspected a site owned and operated by Stacy Hess and designated with Site Code No.

1798180017. AC at 3; Tr. at 8. Mr. Hess operated a scrap metal reclamation business there. AC at 11; Tr. at 9. The site is located off of Route 24 East in Washington, Tazewell County, and its plat description is T26N-R3-2W, SE 1/4 of Section 13. AC at 3; Tr. at 7-8. During his inspection, Mr. Figge took twelve photographs of the site. Tr. at 9; *see* AC at 14-20. At hearing, Mr. Figge testified that his photographs accurately depict what he saw at the site on the date of his inspection (Tr. at 14), and Mr. Hess testified that those photographs “are true to what’s out there.” Tr. at 17. Following his inspection, Mr. Figge verified with the Tazewell County Recorder of Deeds that Mr. Hess owned the site. AC at 11.

At hearing, Mr. Hess testified that, as of June 24, 2004, he no longer owned the site. Tr. at 17. On June 24, 2002, Associated Bank foreclosed on Mr. Hess’ property. Tr. at 22; *see* Exh. 2 (notice of 2006 sale of property including Hess Industrial Park). During 2006, Mr. Maxheimer purchased that property. Tr. at 22. Mr. Hess testified that he had access to the property until the time in 2006 at which Mr. Maxheimer purchased it. *Id.*

The Agency first inspected the site on May 9, 1990, and Mr. Figge has conducted eleven inspections of that property. AC at 11; Tr. at 8. After the first inspection, the Agency required Mr. Hess to remove approximately 3,000 tractor tires. AC at 11. On July 30, 1999, the Agency removed the last 1,000 tires under a Consensual Removal Agreement. *Id.*

Mr. Figge’s December 21, 2004, inspection of the site revealed “[a]n accumulation of charred general refuse.” AC at 11; *see* AC at 17 (photographs 5, 6). Specifically, Mr. Figge observed a container, fencing, bedsprings, twisted metal, and a camper shell. Tr. at 10-11; *see* AC at 17 (photographs 5, 6). A short distance from those materials, Mr. Figge also observed “a partially burnt accumulation of demolition waste.” AC at 11; *see* AC at 19 (photographs 9, 10). Specifically, Mr. Figge observed ashes, processed lumber, a plastic bucket, twisted metal, and a wire ring from a used tire in that accumulation. Tr. at 12; *see* AC at 19 (photographs 9, 10). Mr. Figge also observed approximately 50 tires of various kinds. AC at 11; *see* AC at 15-16, 20 (photographs 2, 3, 11, and 12). His inspection also revealed “evidence of open burning of used tires.” AC at 11; *see* AC at 18 (photographs 7, 8). Specifically, Mr. Figge observed charred materials. AC at 11. He also observed wire bead rings, the wire bundle that is enclosed in a rubber tire unless the rubber has been burned away. *Id.* Mr. Figge also observed other material at the site owned by Mr. Hess: concrete (Tr. at 9; AC at 15 Photograph 1); the frame of a vehicle (Tr. at 9; AC at 15 (photograph 2); furniture (Tr. at 10, AC at 16 (photograph 3); several vehicles (Tr. at 10, 13, AC at 16, 20 (photographs 3, 4, 11); appliances (Tr. at 10, AC at 16 (photograph 3); and foam material (Tr. at 13; *see* AC at 20 (photograph 11).

At hearing, Mr. Hess testified that a majority of the metal debris at the site had been hauled there for him. Tr. at 18. In his testimony, Mr. Hess identified a Mr. Veltman as the source for tires on the site, with the possible exception of one tractor tire. *Id.* Mr. Veltman owns a concrete plant adjacent to the site and rented part of the site. Am. Pet. at 1. Mr. Hess also identified the concrete plant as the source of “the concrete demolition debris.” Tr. at 18; Am. Pet. at 1. Mr. Hess further testified that materials including construction debris, plastic, and tires originated with a building on Mr. Veltman’s property that had collapsed beneath the weight of snow. Tr. at 18; Am. Pet. at 1. Mr. Hess further testified that Mr. Veltman pushed those materials from the collapsed building to the position shown in Mr. Figge’s photographs. Tr. at

18. Testifying with regard to the Site, Mr. Hess further stated that “Mr. Veltman is still burning debris out there.” Tr. 17.

STATUTORY BACKGROUND

The Agency’s administrative citation alleges that Mr. Hess violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2004)) by causing or allowing the open dumping of waste resulting in litter. AC at 2. The citation further alleges that Mr. Hess violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2004)) by causing or allowing open dumping resulting in open burning. *Id.* The citation further alleges that Mr. Hess violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2004)) by causing or allowing open dumping resulting in the deposition of general or clean construction or demolition debris. *Id.*

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 landfill.” 415 ILCS 5/3.305 (2004). “Refuse,” under Section 3.385 of the Act, means “waste.” 415 ILCS 5/3.385 (2004). Section 3.535 of the Act defines “waste” as:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility 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, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto. 415 ILCS 5/3.535 (2004).

Section 3(a) of the Litter Control Act defines “litter” as:

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 (as defined in the Illinois Vehicle Code), motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste as defined in Section 3.360 of the Environmental Protection Act, 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 3.160(a) of the Act defines “general construction or demolition debris” as:

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: brick, 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 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.

General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste. 415 ILCS 5/3.160(a) (2004).

Section 21(a) of the Act provides that no person shall “[c]ause or allow open dumping of any waste.” 415 ILCS 5/21(a) (2004). Section 21(p) of the Act provides that no person shall:

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 . . . * * *
- (3) open burning . . . * * *
- (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(b) of this Act.” 415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2004).

AGENCY’S BRIEF

The Agency claims it has demonstrated that Mr. Hess caused or allowed open dumping at the site. Comp. Br. at 1. The Agency argues 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.’” Comp. Brief at 1, citing 415 ILCS 5/3.305 (2004). The Agency further argues that “‘[r]efuse’ means ‘waste,’ and ‘waste’ includes ‘any garbage . . . or other discarded material.’” Comp. Brief at 1, citing 415 ILCS 5/3.385, 3.535 (2004).

The Agency further argues that “[t]he inspection report admitted into evidence as Exhibit 1 and the testimony at hearing show that wood, tires, concrete, appliances, storm windows, vehicles and vehicle parts, bedsprings, plastic and metal, as well as ash and remains from burning, were accumulated in various piles on the site.” Comp. Brief at 1, citing Tr. at 9-13 and Exh. 1 at 3, 7-12. The Agency further argues that “[t]hese materials constitute ‘discarded material’ within the meaning of the term ‘waste.’” Comp. Brief at 1; *see* 415 ILCS 5/3.535 (2004).

The Agency argues that Mr. Hess accepted responsibility for the majority of the metal and perhaps one of the tires. Comp. Brief at 2, citing Tr. at 18. The Agency further argues that Mr. Hess attributes a majority of the plastic and building debris to his tenant, Mr. Veltman. Comp. Brief at 2, citing Tr. at 16-18. The Agency further argues that Mr. Hess attributes any burning and the presence of a couch and exercise bike to Mr. Veltman’s employees. Comp. Brief at 2, citing Tr. at 19.

In support of its claim that Mr. Hess caused or allowed open dumping, the Agency cites County of Jackson v. Donald Taylor, AC 89-258 (Jan. 10, 1991). The respondent in that case admitted owning the land at issue and dumping some materials there but denied the majority of the dumping and starting a fire. Comp. Brief at 3, citing County of Jackson v. Donald Taylor, AC 89-258 (Jan. 10, 1991). The Agency argues that the Board found that Mr. Taylor had violated the open dumping provisions of the Act despite the fact that he had not specifically allowed dumping or burning. Comp. Brief at 3. The Agency further argues that the Board emphasized that Mr. Taylor had done nothing to prevent dumping or burning from occurring and that the material he dumped “may in fact have encouraged others to dump there.” *Id.*, citing County of Jackson v. Donald Taylor, AC 89-258, slip op. at 9 (Jan. 10, 1991). The Agency claims that this case is analogous to Mr. Hess’ situation. Comp. Brief at 3. The Agency further argues that the Board has held that “a person can cause or allow a violation of the Act without knowledge or intent.” *Id.* (citations omitted).

The Agency argues that the open dumping of these materials resulted in litter. Comp. Brief at 3, citing 415 ILCS 5/21(p)(1) (2004). The Agency claims that, although the Act does not define “litter,” the Board has looked to the definition of that term in the Litter Control Act. Comp. Brief at 3, citing St. Clair County v. Louis I Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991). That definition provides that “[l]itter 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.” Comp. Brief at 3; *see* 415 ILCS 105/3(a) (2004). The Agency argues that material such as wood, tires, concrete, appliances, storm windows, vehicles and vehicle parts, bedsprings, plastic, metal and ash all constitute litter and support a finding that Mr. Hess has violated Section 21(p)(1) of the Act. Pet. Brief at 4; *see* 415 ILCS 5/21(p)(1) (2004).

The Agency further argues that the open dumping of these materials resulted in open burning. Comp. Brief at 4, citing 415 ILCS 5/21(p)(3) (2004). The Agency claims that the Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” Comp. Brief at 4, citing 415 ILCS 5/3.300 (2004). Because piles at Mt. Hess’ site included ashes

and charred and melted materials, the Agency argues that open dumping has resulted in open burning and that Mr. Hess has violated section 21(p)(3) of the Act. Comp. Brief at 4, citing Tr. at 10-12; *see* 415 ILCS 5/21(p)(3) (2004).

The Agency further argues that the open dumping of these materials resulted in the deposition of construction or demolition debris. Comp. Brief at 4, citing 415 ILCS 5/21(p)(7) (2004). The Agency claims that the Act defines “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 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. Comp. Brief at 4, citing 415 ILCS 5/21(p)(7) (2004).

The Agency claims that Mr. Hess has admitted that materials on the site came from a building that had fallen down. Comp. Brief at 4, citing Tr. at 18. The Agency further argues that materials such as processed lumber, storm windows, and possibly some appliances also fall within the definition of “construction or demolition debris.” The Agency argues on this basis that Mr. Hess has violated section 21(p)(7) of the Act. Comp. Brief at 4-5, citing 415 ILCS 5/21(p)(7) (2004).

The Agency claims that Mr. Hess “stated for the first time at hearing that he did not own the site on the date of the inspection.” Comp. Brief at 5, citing Tr. at 17. The Agency argues that Mr. Hess’ interpretation of his legal status with regard to that property contradicts established law. Comp. Brief at 5. The Agency notes that Mr. Hess entered as Exhibit 2 a notice of sale, which indicated that a foreclosure judgment had been entered on the site at issue in this case on June 24, 2004, and amended on January 11, 2006. Comp. Brief at 5; *see* Exh. 2. The notice also indicated that the sale would occur on February 9, 2006. Comp. Brief at 5; *see* Exh. 2. The Agency argues that “[a] judgment ordering the foreclosure of a mortgage is not final and appealable until the court enters orders approving the sale and directing the distribution.” Comp. Brief at 5, citing *In re Marriage of Verdung*, 126 Ill. 2d 542 (1989). The Agency further argues that “a purchaser does not obtain the final right to possession of property purchased at a judicial sale until 30 days after the confirmation of the sale.” Comp. Brief at 5, citing 735 ILCS 5/15-1701(d) (2004). Accordingly, the Agency claims that Mr. Hess still legally owned the site in question at the time of the December 21, 2004 inspection and owned it until events that occurred in 2006. Comp. Brief at 5.

The Agency argues that “[t]he mortgage foreclosure provisions of the Civil Procedure Code provide that the mortgagor remains in possession of the property during the pendency of foreclosure, unless the mortgage documents allow for the mortgagee to be placed in possession, and upon request to the court.” Comp. Brief at 5-6, citing 735 ILCS 5/15-1701(b-c) (2004). Although the Agency acknowledges that the record does not clearly show whether the mortgagee

exercised this right, the Agency claims that Mr. Hess' actions and testimony "tend to show" that Mr. Hess maintained possession of the site until some time on the second half of calendar year 2006. Comp. Brief at 6.

Specifically, the Agency suggests that, through more than one year of status conferences with the Board hearing officer, Mr. Hess made statements consistent with his continued control of and responsibility for the Site. Comp. Brief at 6. At a status conference on June 14, 2005, Mr. Hess reported that he was "working on the site." IEPA v. Stacy Hess, AC 05-47 (June 14, 2005). A month later, he indicated that he planned to "finish cleaning the site within 90 days." IEPA v. Stacy Hess, AC 05-47 (July 14, 2005). Mr. Hess then reported additional progress. IEPA v. Stacy Hess, AC 05-47 (Sept. 1, 2005). The Agency argues that, more than one year after he first reported working on the Site and more than four months after the Circuit Court's notice of the sale of the property, Mr. Hess indicated that he had "almost finished work at the site" for a re-inspection. IEPA v. Stacy Hess, AC 05-47 (June 27, 2006). The Agency further argues that these actions occurring after the December 21, 2004 inspection of the Site indicate that Mr. Hess maintained possession of the Site at the time Mr. Figge observed the violations. Comp. Brief at 6. "Because Respondent was in responsible control of the property when the violations were observed," claims the Agency, "the arguments presented regarding the foreclosure action do not provide a defense to the proven violations." *Id.*

MR. HESS' BRIEF

Mr. Hess argues that "[t]he IEPA did not demonstrate that I caused or allowed open dumping" and that "I never had open burning or dumping on the property." Resp. Brief at 1. Mr. Hess claims that the property had been used as the site of a used tractor parts business for more than 75 years before he bought it and that he used it "to store scrap metal" in the course of his scrap metal reclamation business. *Id.* Mr. Hess states that he "told the IEPA who was renting a portion of my property and told them where the material came from." Specifically, Mr. Hess states that building debris came from a collapsed building on property owned by a Mr. Veltman. *Id.* Mr. Hess further states that concrete originated with Mr. Veltman's concrete plant. *Id.* Mr. Hess further states that a bedspring, couch, wood, and exercise bike came from Robert Davis, an employee of Mr. Veltman's. *Id.* Mr. Hess suggests that renters should bear responsibility for any violations they may cause: "[i]f the property owner is responsible for the renter's action, no one would rent or own property." *Id.*

Mr. Hess states that any materials present on the site were present there before he owned it: "[w]hen I purchased this property there were EPA fines for discarded tires." Resp. Brief at 1. Mr. Hess also states that the Agency told him that he would be responsible as owner of the property for removing those tires even though he had just purchased the property and had not caused the tires to be placed there. *Id.* Mr. Hess suggests that responsibility for cleaning up the property should pass to the current owner: "I had to clean up the property and pay the fines even though I did not cause the violations. Why is it different now?" *Id.* Specifically, Mr. Hess alleges that the new owner of the property "is filling it up with general construction or demolition debris" and suggests that the Agency has not issued him a citation for open dumping. Resp. Brief at 2.

Mr. Hess also states that he had removed 95% of the materials from the property before it was sold at auction in February 2006. Resp. Brief at 1. Mr. Hess suggests that, because the property was cleaned up before the hearing occurred on November 6, 2006, the Board should not find that violations have occurred there. *Id.*

Finally, Mr. Hess requests that the Board hold a second hearing in this case and that it do so on a date that does not follow one of his workdays. Resp. Brief at 1. Mr. Hess suggests that he was misled about the need to hire an attorney and that he was unfairly disadvantaged without having an attorney represent him at hearing regarding caselaw. *Id.*

ISSUES AND ANALYSIS

Open Dumping of Waste

To prove a violation of Section 21(p) of the Act, the Agency must first prove that Mr. Hess caused or allowed the open dumping of waste. See 415 ILCS 5/21(a), (p) (2004). As noted, “open dumping” under the Act is defined 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). “Refuse” is “waste,” and “waste” includes “any garbage . . . or other discarded material” 415 ILCS 5/3.385, 3.535 (2004).

Mr. Hess agrees that the Agency’s photographs in Exhibit 1, which were taken by Mr. Figge on December 21, 2004, accurately show conditions at the site on that date. See Tr. at 17. These photographs, their accompanying inspection report, and testimony at hearing show that materials accumulated at the site included concrete, metal, tires, vehicles, appliances, wood, storm windows, bedsprings, and ashes and other residue of burning. Tr. at 9-14; Exh. 1 (photographs 1-12). Furthermore, Mr. Hess has admitted that these accumulations consolidated materials from sources including property owned by a Mr. Veltman, from Mr. Veltman’s concrete plant, and from an employee of Mr. Veltman’s. Resp. Brief at 1. In addition, the record does not show that the site meets the requirements of a sanitary landfill. See Resp. Brief at 1-2.

Mr. Hess has claimed that he did not own the property in question on December 21, 2004, the date of the Agency’s inspection. Tr. at 17. However, the record shows that, after his inspection of the site, Mr. Figge “proceeded to the Tazewell County Recorder of Deeds’ Office and confirmed that Stacy Hess still owned the property.” Exh. 1 at 3. At hearing, Mr. Hess entered into the record as Exhibit 2 a notice of foreclosure dated June 24, 2004 and stating that the property would be sold on February 9, 2006. Exh. 2 at 1. Mr. Hess testified at hearing that his property was not sold until some time in 2006 and that he continued to have access to the property until that time. Tr. at 22. In addition, during status conferences with the hearing officer, Mr. Hess during 2005 and 2006 made statements about his efforts to clean up the site. These statements are not consistent with relinquishing possession of the site but are fully consistent with continued control of it.

Additionally, in determining whether there has been a violation of the Act’s open dumping provisions, it is not relevant that Mr. Hess has removed some of the materials from the site since the Agency’s December 21, 2004 inspection. As the Board has held, “[t]he Act, by its

terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans-up the site and the Board does not find differently today.” IEPA v. Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990).

Under the particular facts of this case, the Board finds that Mr. Hess, at a minimum, allowed the open dumping of waste by letting waste remain on a site under his control. Even if all of the materials were brought to the site by others, the Board has held that a current owner or operator can be found to have “allowed” open dumping by failing to remove an accumulation of refuse for which that person was not initially liable. See IEPA v. Rawe, AC 92-5, slip op. at 6 (Oct. 16, 1992); see also IEPA v. Goodwin, AC 02-17, slip op. at 4 (July 11, 2002). The Board emphasizes that its holding here is based on the specific circumstances of this case, as it was in Carrico:

[T]he Board is in no way holding that the otherwise lawful operation of a scrap processing and recycling facility constitutes *per se* open dumping. Nor is the Board today establishing any “bright-line” time period for cleaning up salvage yards. IEPA v. Douglas S. Carrico, AC 04-27, slip op. at 9 (Sept. 2, 2004).

It does not aid Mr. Hess that he may never have intended to violate the Act. The Illinois Supreme Court has established that one may “cause or allow” a violation of the Act without knowledge or intent. See People v. Fiorini, 143 Ill. 2d 318, 336, 574 N.E.2d 612, 621 (1991) (“knowledge or intent is not an element to be proved for a violation of the Act. This interpretation of the Act . . . is the established rule in Illinois.”); see also Freeman Coal Mining v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974) (the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to find liability).

The Act authorizes the Board to dismiss an administrative citation when the Board determines that a violation resulted from “uncontrollable circumstances.” 415 ILCS 5/31.1(d)(2) (2004). The Board finds that none of the facts or arguments raised by the respondent support a conclusion that “uncontrollable circumstances” justify dismissing the citation. While the Board in rare cases will dismiss an administrative citation without finding uncontrollable circumstances (see IEPA v. Jack Wright, AC 89-227, slip op. at 14 (Aug. 30, 1990)), the record in this case does not warrant that result.

Litter

The Act does not define “litter,” but the Board has applied the definition provided in the Litter Control Act, which defines “litter” in part as “any discarded, used or unconsumed substance or waste.” 415 ILCS 105/3(a) (2004); St. Clair County v. Louis I. Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991). The definition specifically includes metal and “anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly.” 415 ILCS 105/3(a) (2004). Photographs of Mr. Hess’ site depict concrete, tires, vehicles, appliances, wood, bedsprings, plastic, metal, and ashes and other residue of burning. The Board finds that these materials open dumped on Mr. Hess’ site qualify as “litter” under the Act.

Open Burning

The Act provides that “open burning is the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2004). At the site, piles of materials contained ashes and various charred residue. The Board finds that these materials constitute persuasive evidence that open dumping resulting in open burning has occurred at Mr. Hess’ site.

Construction or Demolition Debris

The Act’s definition of “general construction or demolition debris” includes a range of “uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads . . .” 415 ILCS 5/3.160(a) (2004). Mr. Hess has admitted that some of the materials present on his site originated with a building that fell down. Materials such as plastic, wood and storm widows fall within that definition. The Board finds that materials open dumped at Mr. Hess’ site qualify as “general construction or demolition debris” under the Act.

Request for Additional Hearing

Mr. Hess suggests that he was misled about the need to hire an attorney in this proceeding: “I was told the hearing was set up that you did not have to hire an attorney obviously I was wrong.” Resp. Brief at 1. The Board’s procedural rules provide that an individual such as Mr. Hess who is a party in a Board adjudicatory proceeding “may appear on their own behalf *or* through an attorney-at-law licensed and registered to practice law.” 35 Ill. Adm. Code 101.400(a)(1) (emphasis added). Mr. Hess’ understanding that he did not have to be represented by an attorney at hearing or otherwise was precisely correct. The Board has held a hearing, at which Mr. Hess appeared and offered testimony and a hearing exhibit. His appearance at that hearing on his own behalf is specifically authorized by the Board’s procedural rules. Those rules do not specifically provide for a second hearing on an administrative citation. *See* 35 Ill. Adm. Code 108.300 (referring to “the hearing”). Consequently, the Board denies Mr. Hess’ request to hold an additional hearing in this matter.

Finding of Violations

Having found that Mr. Hess allowed the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris, and that none of his purported defenses have merit, the Board finds that Mr. Hess violated Sections 21(p)(1), (p)(3), and (p)(7) of the Act.

Civil Penalty and Hearing Costs

The Agency seeks the statutory \$1,500 civil penalty per violation, for a total of \$4,500, as well as hearing costs. AC at 2-3. Because Mr. Hess violated Sections 21(p)(1), (p)(3), and (p)(7), the Board now discusses the issues of civil penalty and hearing costs. Both are addressed in Section 42(b)(4) 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 a \$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) (2004).

Mr. Hess states that, by the time the Board conducted its hearing in this proceeding on November 6, 2006, he had removed 95% of the materials that had been previously been at the property. When the Board finds a violation in a formal enforcement action brought under Section 31 of the Act, the Board has the discretion to impose a penalty and, if the Board decides to impose one, the Board may consider factors that mitigate the amount of penalty. *See* 415 ILCS 5/33(c), 42(h) (2004). In an administrative citation action, however, the Board has no such discretion after finding a violation. *See* 415 ILCS 5/42(b)(4) (2004). The Board must impose the statutory civil penalty on Mr. Hess.

There is no indication that this is a second or subsequent adjudicated violation for Mr. Hess. Therefore, the Act sets the civil penalty for these first violations of Sections 21(p)(1), (p)(3), and (p)(7) by Mr. Hess at \$1,500 per violation, totaling \$4,500. *See* 415 ILCS 5/42(b)(4) (2004); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the penalty in its final opinion and order.

In addition, by unsuccessfully contesting the administrative citation at hearing, Mr. Hess also must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2004); 35 Ill. Adm. Code 108.500(b)(3). However, the record now contains no information on the amount of those costs. The Board directs both the Agency and the Clerk of the Board to file a statement of costs, supported by affidavit, and to serve the filing on Mr. Hess. Mr. Hess will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that Mr. Hess caused or allowed the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris. Having found the violations in this administrative citation action, Mr. Hess must pay a civil penalty of \$4,500 and the hearing costs of the Agency and the Board. As set forth in the order below, the Board directs the Agency and the Clerk of the Board to file hearing cost documentation, to which Mr. Hess may respond. After the time periods for the filings on hearing costs have run, the Board will issue a final opinion and order imposing the civil penalty on Mr. Hess and assessing any appropriate hearing costs.

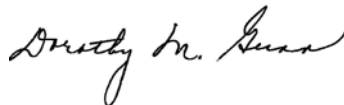
This interim opinion constitutes the Board's interim findings of fact and conclusions of law.

ORDER

1. The Board finds that Mr. Hess violated Sections 21(p)(1), (p)(3), and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2004)).
2. By March 22, 2007, the Agency must file with the Board a statement of its hearing costs. The statement must be supported by affidavit and served upon Mr. Hess. Also by March 22, 2007, the Clerk of the Board must submit a statement of the Board's hearing costs. The statement must also be supported by affidavit and served upon Mr. Hess.
3. By April 12, 2007, Mr. Hess may file with the Board a response to the statements of hearing costs required by paragraph 2 of this order. Mr. Hess must serve any such response on the Agency. The Agency may file a reply to Mr. Hess' response within 14 days after being served with that response.

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 March 1, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board