

ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	No. AC-06-49
Complainant,)	(IEPA No. 96-06-AC)
-vs-)	(Administrative Citation)
)	
MICHAEL GRUEN and JON ERIC GRUEN,)	
d/b/a JON'S TREE SERVICE,)	
)	
Respondents.)	

NOTICE OF FILING

TO: Michelle M. Ryan
Special Assistant Attorney General
Illinois Environmental Protection Agency
1021 N. Grand Ave. East
PO Box 19276
Springfield, IL 62794-9276

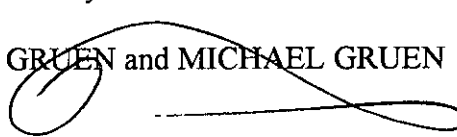
Please take notice that on this date I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois the following instrument entitled Post-Hearing Brief of Respondents.

Date: May 30, 2007

Respectfully submitted:

JON GRUEN and MICHAEL GRUEN

BY: _____



Phillip H. Hamilton, #6201288
Ebony R. Huddleston, #6288261
Farrell, Hamilton & Julian, P.C.
1305 D'Adrian Professional Park
Godfrey, IL 62035
Phone: 618-466-9080
Fax: 618-466-9105
Email: phil.hamilton@farrellhamiltonjulian.com

POST-HEARING BRIEF OF RESPONDENTS

The state's case is flawed because Respondent, Jon Gruen, uses the items which are the subject of the Complaint in his business, they are not abandoned and they do not constitute "litter".

The administrative citation issued to Respondents raises the sole issue of whether they have caused or allowed the open dumping of waste in a manner resulting in litter, in violation of Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1). 415 ILCS 105/3 defines "litter" as meaning any discarded, used or unconsumed substance or waste. "Litter" as defined under the Illinois Environmental Protection Act refers to material of little or no value that has not been properly disposed of. Miller v. Pollution Control Bd., 267 Ill. App. 3d 160, 642 N.E.2d 475 (Ill. App. Ct. – 4th Dist. 1994). The administrative citation makes no reference to the accumulation of "landscaping waste". The citation makes the blanket characterization that the items at issue constitute "waste", and that Respondents have caused or allowed the open dumping of said waste in a manner resulting in litter. The state's case depends on a finding that the material is of little or no value that has not been properly disposed of. The facts show that Respondent, Jon Gruen, uses the subject items in his business, they are not abandoned, and they are valuable.

The first category relates to the timber which Respondent sells as firewood or uses for other business purposes. The timber is valuable and has not been improperly disposed of. The second category relates to the vehicles that are on the property. The vehicles at issue do not come within the meaning of litter because they have not been "abandoned". The Illinois Vehicle Code 625 ILCS 5/1-101.05 defines an "abandoned vehicle" as any vehicle in a state of disrepair rendering the vehicle incapable of being driven in its condition or any vehicle that has not been moved or used for seven consecutive days or more and is apparently deserted. In this case, the

vehicles have been in the custody and control of Jon Gruen, and they have not been deserted. The third category relates to a metal tank and scrap material which the testimony shows have a business use, are valuable, and have not been improperly disposed of.

The infirmities in the government's case became evident during cross-examination of the state's sole witness, Jan Mier. Mier admitted that she had not been to the property since her last inspection on April 20, 2006. 18:18-22 (references are to the hearing transcript dated March 14, 2007, page, then line number). She had no information as to the current condition of the property. 19:5-8. When asked if the wood shown on site was being used in Jon Gruen's business and it was held for resale, she admitted it would not be litter. 19:9-16. Mier testified that if he was using this timber in his business, then it would not be litter. 19:17-21. She opined, however, that some of the wood was starting to disintegrate at the bottom of the piles and it would take a long time to get rid of the amount of wood. 19:21-20:1. If Gruen was using the wood as firewood, then it was not litter. 20:2-6. Mier agreed that if Gruen testified that he sold the timber as firewood, that she could not dispute it. 20:6-10. She did dispute that all of the timber could be used for firewood. 21:3-6. She had no personal knowledge, however, as to what Gruen actually did with the material. 21:22-24. Mier admitted that Gruen had told her that what he does with the timber is to chop it up, cut it up, and sell it as firewood. 22:5-8.

Mier agreed that pictures number 6 and 7 in her report showed certain drums used for burning. 22:9-13. Gruen was not being charged with a violation relating to the drums. 22:13-16. Mier did not dispute Gruen's characterization that the drums were used in his business, they were not discarded, and they were not abandoned. 22:23-23:4.

Picture number 8 showed a metal tank, but she had no personal knowledge as to what his use was for that tank. 23:7-9. She did not dispute that Gruen intended to take that tank and convert it into a wood-burning stove. 23:10-14.

Mier agreed that some of the vehicles were used by Respondent in this business, but she did not believe that a small red car, a boat, and a van onsite were being used in the business. 23:18-24:7. She did not dispute that Gruen intended to have certain of the vehicles repaired. 24:19-21.

Mier did not know what Gruen did with certain wire, metal, plastic, mowers and vehicle parts shown in photos number 11, 12, and 13. 26:8-12. Mier disagreed that Respondent was accumulating scrap material to take it someplace and get money for it. 26:13-18. She thought it had been sitting there for a long time, but she was not sure that all of the material that is reflected in the above referenced pictures had been sitting there for two years. 27:7-12.

When asked as to whether there was a time limit on how long Respondent had to dispose of the material, Mier stated that "at some point a product can become waste". 28:16-23. The material in question constituted litter because she said "he's not using it". 29:11-17. She suggested that Gruen had let the wood sit for a number of years. 29:17-18. She admitted, however, that other than what she had observed on the property, she had no idea what Gruen did with the timber. 29:24-30:2.

Mier conceded that there was no violation of "landscaping waste". 30:24-31:7. She suggested, however, that landscape waste is considered waste. 31:8-14. Her report, however, made no reference to "landscape waste". 31:15-18.

Mier was read the definition of an abandoned vehicle under the Vehicle Code, 625 ILCS 5/1-101.05. 32:21-33:7. Although she disputed that the cars and vans on the site were used in the business, she did not know whether the vehicles were deserted. 33:8-18.

Mier opined that a farmer could not take some of the wood that is degraded, and put it into a wood-burning stove. 34:20-35:1. She admitted that it could possibly be chipped up and used for mulch or woodchips or something like that. 35:2-6. Although she understood there was a time limit on how long a Respondent would have to dispose of the material in question, she conceded that there was no time limit on removal stated in any statute, regulation, or policy of the EPA. 35:11-23.

Despite the fact that the open dump inspection checklist referred to a number of violations of the statute, counsel for the state conceded that Respondent was only being charged with a violation of Section 21(p)(1). 37:5-6. Respondent was not being charged with: causing or allowing open dumping as defined under Section 21(a); conducting any waste-storage, waste-treatment, or waste-disposal operation without a permit as referenced in Section 21(d); disposing, treating, storing, or abandoning any waste, or transporting any waste into the state at/to sites not meeting requirements of the Act and regulations as referenced in Section 21(e); or failing to submit an application for a permit to develop and operate a landfill as referenced in Section 812.101(a) (see Open Dump Inspection Checklist dated 4/20/06).

Jon Gruen testified that the nature of his business was to remove trees; grind stumps; and sell firewood. 41:19-22. He also delivered chips, mulch, and also some scrap metal on the side. 41:22-23. He estimated an average yearly gross income associated with the business of about \$75,000. 41:24-42:2. After a tree is chopped down, he would chip up all the brush on site normally. 42:9-12. He would sell the hardwood as firewood and the non-reusable soft woods

would be given away to farmers in the area who would burn it in their outside wood-burning stoves. 42:11-17. He stacked and split the wood. 42:18-22. He cut the split wood into three to four foot lengths and stacked it for seasoning, a process which takes nine months to a year. 42:23-43:6. No one had ever stated to Gruen that there was some kind of a time limit for how long he could store the timber on the property. 43:7-10.

Gruen testified that all of the timber and whatever is left from cutting down trees was useable by somebody. 43:19-22. As to wood that may have been degraded, a farmer could use the wood in an outside wood-burning stove. 44:3-9. Some of the degraded wood could be chipped and used for mulch or woodchips. 44:10-12. Gruen identified Plaintiff's Exhibits 1-13 as showing that he had sold certain timber for firewood. 44:24-46:10. These were only a portion of the receipts referencing a few months worth of sales. 46:11-15. Of his annual gross income of about \$75,000 a year, he estimated that 20% to 25% was from the sale of cut firewood. 46:16-21.

Gruen identified Exhibits 14 through 28 as pictures showing the timber, and the condition thereof, and testified that all of the material could be put to a business purpose. 49:6-52:24. Although the Hearing Officer permitted Respondent to make an offer of proof with the pictures, they were not admitted into evidence because they were not taken in April 2006. Respondent submits that the pictures, taken in July 2006, fairly represented the condition of the subject items and that it was immaterial that they post-dated Mier's inspection. To hold otherwise would mean Respondent would have to hire an attorney and accumulate evidence on the same day as the inspection, despite the fact that Complainant did not even charge him with a violation of the law until issuing the Administrative Citation on May 26, 2006. The Hearing Officer erred in not admitting the pictures.

Respondent's Exhibit 29 was a log splitter used to split the logs. 53:15-20. Plaintiff's Exhibit 30 showed the tools used in the tree cutting business. 54:10-19. Respondent did not consider any of the material that he had identified to be discarded; abandoned; waste; garbage; trash, debris or rubbish. 55:2-17.

As to the burning barrels, no one from Macoupin County had told him that he could not burn some of the residue that he had. 56:8-21. In addition, no one from the EPA had told him that he could not use the drums to burn. 56:22-24.

The Hearing Officer erred in disallowing the admission of Exhibits 29 through 31 because the pictures had not been taken in April 2006. The pertinent fact was that the tools were used in Mr. Gruen's business of processing the timber – the date of the pictures was immaterial.

Mr. Gruen identified a number of vehicles on the property:

(a) a 1987 Chevrolet Caprice which still ran, but it needed brakes. 57:10-15. It was not a deserted vehicle (57:16-17);

(b) a 1985 Chevrolet 1-ton dump truck used in the business which needed a master cylinder, but this was not a complicated repair (57:18-58:7);

(c) a 1987 GMC Jimmy 4-wheel drive truck that was not owned by him, but was used by one of his workers in the business (58:8-21);

(d) a 1985 Dodge van used to pull trailers full of logs which needed freeze plugs put in it (58:22-59:8). It was not a deserted vehicle and he intended to make the repairs (59:9-12);

(e) a 1994 Chevrolet 1-ton dump truck used to hold chips in the bed and to pull trailers of logs (59:13-21);

(f) a 1974 Chevrolet dump truck that was used in the business (60:1-3);

(g) a 1986 Dodge pickup truck used in the business to pull trailers and to store tools to keep them out of the weather (60:4-11);

(h) a 1991 Chevrolet pickup used to pull trailers (60:12-14);

(i) a 1984 Ford 1-ton dump truck used in the tree business for accumulating chips (60:15-17);

(j) a 1975 Chevrolet flatbed pickup used in the business (60:18-20);

(k) a 1981 Chevrolet Camaro that was not used in the business, but it was a collectors item and he intended to fix it; it was not a deserted or abandoned vehicle (60:21-61:4). He estimated it had a value of about \$10,000 (61:5-6);

(l) a 1986 Ford pickup which needed a new rear end and Respondent intended to repair it (61:7-15); and,

(m) a boat which was a recreational vehicle, not used in Respondent's business (69:13-21).

So in summary, other than the Camaro, Caprice, and boat, Respondent used all of the vehicles in his business. 61:16-19. The vehicles were not deserted; abandoned; discarded; offensive; likely to injure anyone or create a traffic hazard, or unsightly. 61:20-62:11.

Gruen also testified about a metal tank which he had saved that he intended to convert into a wood-burning stove. 64:2-5. Respondent had not abandoned the metal tank and he intended to use it in his business. 64:10-12.

The administrative citation also had some pictures of some truck beds that contained wire, metal, plastic, mowers and vehicle parts. 64:15-18. Gruen testified that he ran across scrap material and that he would accumulate it and sell it. 64:20-65:7. Respondent had not abandoned the material and it did have a business use. 65:12-15.

The import of the state's position would be to effectively put Mr. Gruen out of business. Mr. Gruen grossed \$75,000 a year in his tree business, and the sale of the timber and bark and related material constituted 20% to 25% of his gross receipts. Since there was no time limit as to how long he had to use the material, it appears that the state's position that the material constitutes waste is baseless, and not supported by the evidence.

As to the vehicles, since Mr. Gruen was in the custody and control of the vehicles, they were not "deserted", and therefore did not constitute abandoned vehicles, and therefore did not constitute litter.

The state cites a number of Pollution Control Board opinions in its brief which it apparently believes are persuasive on the issues presented by this case. Respondents submit that *although the state and the Pollution Control Board appear to frequently cite to prior decisions, these rulings are not binding precedent – the Pollution Control Board is free to accept or reject those prior decisions in any subsequent matter that comes before the board.* Counsel for the government does not cite any case law precedent, nor does there appear to be any, which would be dispositive of the issues herein: whether the timber and items which are used in the Respondent's business, and the vehicles which are not deserted, constitute litter within the meaning of the statute?

Assuming, for the sake of argument, that prior decisions of the board are of some persuasive value to the hearing officer in making a recommendation, or the Pollution Control Board in making its decision, the administrative holdings cited appear to be distinguishable on the facts. In Illinois EPA v. Northern Illinois Service Corporation, PCB AC 05-40 (September 21, 2006), the respondent specialized in excavation and demolition contracting at its site. Page 2. The respondent had 9,700 cubic yards of landscape debris piled northwest of certain concrete

debris. Page 3. The trees at the site were not processed in any way. Although the board found that landscape waste was a subset of waste (page 8), it appears on the facts that the respondent had no real use for the dead or uprooted trees that were removed as part of its business. The respondent's business had little to do with the further processing of the timber. Gruen's business is the processing of timber.

In St. Clair County v. Louis I. Mund, PCB AC 90-64 (August 22, 1991), the board found that "litter" includes refuse or debris dumped on private property with the consent of the owner of such property. Page 6. There did not appear to be any evidence that the accumulation of the material in question had any business purpose. Respondents herein do not claim that Michael Gruen has consented to having waste dumped on his property. The facts show, however, that Jon Gruen uses the material in his business, and therefore the accumulation is not litter within the meaning of the statute.

In Illinois EPA v. Yocum, et al. PCB AC 01-29 01-30 (consolidated) (June 6, 2002), the respondent had allowed the accumulation of two school buses, several vehicles, and several trucks. Page 3. The respondent purchased the vehicles and intended to use them and restore them when he retired in about 10 years, and he used some of them as a source of parts for his truck. Id. Although the board found that the vehicles were discarded and constituted waste, there appears to have been no evidence that any of the vehicles in question were used for any type of a business purpose. The respondent simply had some vague indication that he intended to restore the vehicles in 10 years after he retired. Page 6. Notably the board found that plans for use of material at some point in the distant future was not dispositive in determining if materials are waste or litter. Page 8. Respondents herein submit that the vehicles in question are

used in Gruen's business, and have a business function, distinguishing the case clearly from the circumstances of the Yocum matter.

CONCLUSION

The state's case is wrong because the only reliable evidence relating to the timber indicates that all of it can be cut up, chipped, burned in a wood burning stove, or used for a business purpose. The state's sole witness admits that she does not know what Respondent does with the materials in question. The state has not carried its burden of proof to show that Respondents have committed waste – by Mier's own admission, there is no set time limit for Respondents to use the materials in question. As to the vehicles, they do not meet the legal definition of being "abandoned". The vehicles are not "apparently deserted". As to the miscellaneous material accumulated as scrap, there is no reliable evidence to refute Gruen's testimony that he intends to accumulate it, sort it, and sell it. The state's position herein is unreasonable, and not sufficiently supported by the evidence to warrant imposing a civil penalty on Respondents. The import of the state's position is to effectively put Jon Gruen out of business.

WHEREFORE, Respondents, Jon Gruen and Michael Gruen request that the Illinois Pollution Control Board reverse the determination that they violated the Illinois Environmental Protection Act and not impose a civil penalty. Respondents pray for such other and further relief as the board deems equitable and just.

Respectfully submitted:

JON GRUEN and MICHAEL GRUEN

BY: 

Phillip H. Hamilton, #6201288

Ebony R. Huddleston, #6288261

Farrell, Hamilton & Julian, P.C.

1305 D'Adrian Professional Park

Godfrey, IL 62035

Phone: 618-466-9080

Fax: 618-466-9105

Email: phil.hamilton@farrellhamiltonjulian.com

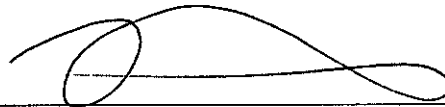
PROOF OF SERVICE

I hereby certify that I did on the 30th day of May, 2007, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument(s) entitled NOTICE OF FILING POST-HEARING BRIEF OF RESPONDENTS

To: Michelle M. Ryan
Special Assistant Attorney General
Illinois Environmental Protection Agency
1021 N. Grand Ave. East
PO Box 19276
Springfield, IL 62794-9276

and an electronic copy of the same foregoing instrument on the same date via electronic filing

To: Dorothy Gunn, Clerk
Pollution Control Board
James R. Thompson Center
100 West Randolph St., Ste. 11-500
Chicago, IL 60601



Phillip H. Hamilton
Farrell, Hamilton & Julian, P.C.
1305 D'Adrian Professional Park
Godfrey, IL 62035
Phone: 618-466-9080
Fax: 618-466-9105
Email: phil.hamilton@farrellhamiltonjulian.com