

ILLINOIS POLLUTION CONTROL BOARD
December 6, 2007

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 05-72
)	(IEPA No. 144-05-AC)
GARY CLOVER, d/b/a CLOVER)	(Administrative Citation)
CONCRETE,)	
)	
Respondent.)	

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

GARY CLOVER APPEARED *PRO SE* AT STATUS CONFERENCES.

INTERIM OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On May 23, 2005, the complainant, the Illinois Environmental Protection Agency (Agency), timely filed an administrative citation against the respondent, Gary Clover (Mr. Clover), doing business as Clover Concrete. *See* 415 ILCS 5/31.1(c) (2006); 35 Ill. Adm. Code 108.202(c). The Agency alleged that on March 31, 2005, the respondent violated Sections 21(p)(1), (p)(3), and (p)(4) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(3), (p)(4) (2006)). The Agency alleges that the respondent violated these provisions by causing or allowing the open dumping of waste in a manner that resulted in (1) litter, (2) open burning, and (3) the deposition of waste in standing or flowing waters at the respondent's site located at 11704 North Route 37 in Marion, Williamson County. For the reasons below, the Board finds that the respondent violated the Act as alleged by causing or allowing the open dumping of waste resulting in litter, open burning, and the deposition of waste in standing or flowing waters.

The respondent is subject to a statutory civil penalty of \$1,500 for each of the three violations, and therefore is liable for a total civil penalty of \$4,500 as well as the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2006). In this interim opinion and order, the Board first makes the finding of the violations, then directs the Agency and the Clerk of the Board to provide hearing cost documentation, and allows the respondent the opportunity to respond to the costs claims. After the time expires for making all hearing cost filings, 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), (p), 31.1(c), 42(b)(4), (4-5) (2006); 35 Ill. Adm. Code 108.

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) (2006). 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.* 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(b)(4-5) (2006).

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) (2006). 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), (4-5) (2006).

PROCEDURAL HISTORY

On May 23, 2005, the Agency filed the administrative citation (AC) with the Board. On June 16, 2005, Mr. Clover filed a letter that the Board construed as a petition for review of the administrative citation. In an order dated July 7, 2005, the Board accepted that filing as a timely petition for review (Pet.), and assigned the case to Board Hearing Officer Carol Webb.

Between July 26, 2005 and August 21, 2006, Hearing Officer Webb conducted ten status telephonic conferences at which Mr. Clover and counsel for the Agency discussed work being done at the site, and the possibility of settlement of the action. The substance of each status conference was briefly described in hearing officer orders following the call. *See* Hearing Officer Orders, AC 05-72 (July 26, 2005; Sept. 13, 2005; Oct. 13, 2005; Jan. 4, 2006; Mar. 9, 2006; Apr. 11, 2006; June 14, 2006; July 18, 2006; and Aug. 21, 2006).

The hearing officer's report of the September 21, 2006 status conference indicated that Mr. Clover was reviewing a stipulation prepared by the Agency, and was considering hiring an attorney to review it and to discuss the penalty amount. *See* Hearing Officer Order, AC 05-72 (Sept. 21, 2006). Additional status conferences were held on October 30, 2006, at which Mr. Clover did not appear; on November 29, 2006, at which he did appear; and on January 4, 2007, at which he did appear and was informed that a hearing date would be set at the next conference on February 8, 2007. *See* Hearing Officer Orders, AC 05-72 (Oct. 30, 2006; Nov. 29, 2006; and

Jan. 4, 2007). The February 8, 2007 hearing officer order stated that Mr. Clover did not appear at that day's status conference, that the next status conference was set for March 6, 2007, that Mr. Clover should have his attorney appear at that time, and that hearing had been set for April 18, 2007. *See* Hearing Officer Order, AC 05-72 (Feb. 8, 2007).

On March 6, 2007, the hearing officer issued a notice stating that hearing would be held on May 8, 2007, at the City Hall in Marion. At the scheduled time and place, Hearing Officer Webb convened the hearing. The hearing transcript (Tr.) relates that Special Assistant Attorney General Michelle M. Ryan appeared and participated on behalf of the Agency. Tr. at 5. Mr. Clover did not appear at hearing either in person or by an attorney. *Id.* One witness testified at hearing: Mr. Scott A. Arnold of the Agency. Tr. at 6-15. The hearing officer admitted one exhibit (Exh. 1) into evidence, consisting of site photographs. Tr. at 15-16. Based on her legal judgment, experience, and observations at hearing, Hearing Officer Webb found that the witness testified credibly. *Id.*

On May 9, 2007, the Agency filed a motion to substitute modified pages 1 and 2 of the administrative citation to replace those originally filed May 23, 2005. As discussed at hearing (Tr. at 5-7), the modification had two purposes. The first was to correct the date of the inspection to show that the inspection date was March 29, 2005, (as indicated on the site photographs admitted as Exhibit 1) and not March 31, 2005, as originally alleged. The second was to clarify that Gary Clover in this case is not the same person the Board found had committed a violation of Section 21(p)(1) in a previous case, County of Jackson v. Gary Clover, AC 04-37 (Mar. 18, 2004).

On June 4, 2007, the Agency filed its post-hearing brief. Pursuant to the briefing schedule, the respondent's brief was due on or before June 18, 2007, and any reply brief by June 25, 2007. Apparently in lieu of a brief, on June 13, 2007, Mr. Clover filed a letter (Resp. Let.), to which the Agency filed no reply.

The Board grants the Agency's May 9, 2007 motion to substitute pages of the administrative citation, as the respondent made no objection. *See* 35 Ill. Adm. Code 101.500(d) (lack of response to motion constitutes waiver of objection to granting motion).

FACTS

On March 29, 2005, Agency Environmental Protection Specialist Scott A. Arnold inspected a site owned and operated by Gary Clover, doing business as Clover Concrete. The site is designated with Site Code No. 1990555132 and commonly known to the Agency as Clover Concrete. AC at 1; Tr. at 10. The site address is 11704 N. Route 37, Marion, Williamson County. Mr. Arnold describes the site as a former clay quarry about three miles north of town. AC at 3; Tr. at 10. During his inspection, Mr. Arnold took three photographs of the site. Exh. 1; Tr. at 11.

In his narrative inspection report filed with the administrative citation, Mr. Arnold stated he inspected the property following a complaint concerning open dumping and burning. He additionally related:

I met with Gary and Ron Clover of Clover Concrete Products. They have a large quarry on site. In the bottom of the pit I noted burned, partially buried and exposed landscape waste. I took photos of the site. [See Exh. 1 and Tr. at 11.]

Mr. Clover told me Hodge Tree Services, out of Marion, had dumped some landscape/trade waste. He stated that he and his son had done the burning. They were letting Hodge bring the materials there because “we were going to fill it up anyway”. Tracks show that construction equipment was used to push the logs, limbs and root balls into the bottom of the pit. The exposed waste in this area measured about 40 yards X 4 yards X 2 yards. The pit floor was covered with water. The waste had been pushed into the accumulated water. Surface debris indicated additional wastes might have been buried here. AC, Narrative Inspection Report at 1.

At hearing, Mr. Arnold added that the debris was mainly rocks and landscape waste, although some processed wood was evident. Tr. at 12.

As previously stated, Mr. Clover did not appear at hearing either personally or by an attorney. The one-paragraph letter he submitted on June 13, 2007, stated that he did not appear at hearing because he “did not receive the letter until May 18, 2007,” and also stated that his mother had passed away on May 7, 2007. Resp. Let. at 1. As to the substance of the alleged violation, the letter stated the site was not a dump, and that:

We were stacking brush and giving away wood to those who needed firewood. We called the local fire department and asked if we could burn the brush. Their (sic) reply was that it was okay as long as I did not place car tires on the brush. We did not place car tires on the brush when we burned it. After about two weeks of burning brush, we received a lot of rain. We DID NOT burn in standing water! The pictures you took were after the big rain we received. We feel you are discriminating against us when other burning of brush is still going on and nothing is being said. *Id.* (emphasis in original).

Mr. Clover concluded by stating “[i]f we need to we will hire a lawyer”. *Id.*

STATUTORY BACKGROUND

The Agency’s administrative citation alleges that the respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2006)) by causing or allowing the open dumping of waste resulting in litter. AC at 2. The citation further alleges that the respondent violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2006)) by causing or allowing open dumping resulting in open burning. *Id.* In addition, the citation alleges that the respondent violated Section 21(p)(4) of the Act (415 ILCS 5/21(p)(4) (2006)) by causing or allowing open dumping resulting in the deposition of waste in standing or flowing waters. *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 (2006). “Refuse,” under Section 3.385 of the Act, means “waste.” 415 ILCS 5/3.385 (2006). 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 (2006).

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. 414 ILCS 105/3(a) (2006).

Section 3.300 of the Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2006).

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) (2006). 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;

* * *

- (4) deposition of waste in standing or flowing waters. 415 ILCS 5/21(p)(1), (p)(3), (p)(4) (2006).

DISCUSSION

The respondent's initial petition and post-hearing letter is the only material presented by the respondent in defense of the alleged violations of Sections 21(p)(1), (p)(3) and (p)(4) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(4) (2006)). The Board finds that the respondent's evidence is insufficient to support a finding for the respondent in this case.

The Board first addresses the alleged lack of proper notice of hearing, and finds the argument unsupported by facts and unpersuasive. The Board's Clerk serves copies of all hearing officer orders, hearing notices, and Board orders to parties at the service address provided in the initial pleadings as later corrected by any party. If any item is returned as undeliverable, that fact is recorded by the Clerk on the docket sheet for the particular case. There is no record of any returned mail addressed to Mr. Clover in this docket.

It is clear from the record that Mr. Clover had been contemplating hiring an attorney as early as September 2006. He did not do so. Mr. Clover personally participated in a telephonic status conference on January 4, 2007, in which the hearing officer stated that a hearing would be scheduled at the February 8, 2007 status conference. While Mr. Clover did not appear at the February 8 status conference, he received the hearing officer order memorializing that conference. The February 8, 2007 hearing officer order stated that Mr. Clover did not appear at that day's status conference, that the next status conference was set for March 6, 2007, that if he was still considering hiring an attorney that Mr. Clover should have his attorney appear at that time, and that the hearing had been set for April 18, 2007.

The hearing notice setting the May 8, 2007 hearing date was issued March 6, 2007, leaving Mr. Clover 60 days to register objection to the date. None was made. While the Board regrets the death of Mr. Clover's mother shortly before the scheduled hearing date, that event does not excuse Mr. Clover's failure to earlier pursue his own response to the charges in the administrative citation. The Board accordingly finds that Mr. Clover had appropriate notice of the May 8, 2007 hearing he did not attend.

In IEPA v. Omer Thomas, AC 89-215 (Jan. 23, 1992), 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) (2006)]. Thomas, AC 89-215.

The Board has consistently held that absent one of these two defenses, a violation must be found. *See, e.g., IEPA v. Bencie*, AC 04-77 (Feb. 16, 2006); *see also* 35 Ill. Adm. Code 108.206.

A review of the record clearly establishes that the violations did occur, and no evidence or argument indicates that this was the result of “uncontrollable circumstances” within the meaning of the Act. 415 ILCS 5/31.1(d)(2) (2006). The AC itself, the testimony of the Agency inspector, and the site photos all indicate the presence of rocks, wood, charred wood, and landscape waste on the site, some of which is located in standing water. *See* AC; Tr. at 5-15; Exh. 1. These materials were brought to the site, and were not the result of Clover Concrete’s on-site activities involving landscape waste. *See* AC, Narrative Inspection Report at 1. While he does not concede that open dumping occurred or that the materials on-site were refuse, Mr. Clover admits that open burning occurred. Mr. Clover’s bare argument that the site was not an open dump and that standing water was a result of rains following the open burning does not amount to “uncontrollable circumstances” within the meaning of the Act and precedent. Therefore, as alleged in the administrative citation, the Board finds that the respondent, Gary Clover, doing business as Clover Concrete, violated Sections 21(p)(1), (p)(3), and (p)(4) of the Act (415 ILCS 5/21(p)(1) (p)(3), and (p)(4) (2006)).

Based on the record before the Board, the Board finds that the respondent violated Sections 21(p)(1), (p)(3) and (p)(4) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(4) (2006)) by causing or allowing the open dumping of waste on the respondent’s property resulting in litter, open burning, and the deposition of waste in standing or flowing waters.

STATUTORY PENALTY AND HEARING COSTS

The civil penalty for violating any provision of subsection (p) of Section 21 is \$1,500 for each violation, except that the penalty amount is \$3,000 for each violation that is the person’s second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2006). Because there are three violations of Section 21(p) of the Act (415 ILCS 5/21(p) (2006)) and no allegation that any of these violations are second or subsequent adjudicated violations, the total civil penalty is \$4,500. 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. The respondent may file any objection within 21 days after service of the claimed costs, and the Agency may respond within 14 days after service of the objection. After considering the costs statements, and any objection by the respondent, and any Agency response, the Board will issue its final decision assessing the penalty and appropriate hearing costs, and ordering their payment.

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

ORDER

1. The Board finds that the respondent, Gary Clover, d/b/a Clover Concrete, violated Sections 21(p)(1), (p)(3), and (p)(4) of the Environmental Protection Act (415 ILCS 5/21(p)(1), (p)(3), (p)(4) (2006)) at the respondent’s site located at 11704 North Route 37 in Marion, Williamson County.

2. The 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 December 20, 2007. Each statement must be supported by affidavit and served on the respondent.
3. The respondent may object to the statements of hearing costs ordered in paragraph two of this order within 21 days after service of that information.
4. The Agency may file any response to the respondent's objection within 14 days after service of the objection.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 6, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board