

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Complainant,

vs.

BOBBY G. MYERS and DONALD D.
MYERS,

Respondents.

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AC 07-30

STATE OF ILLINOIS
Pollution Control Board

(IEPA No. 375-06-AC)

NOTICE OF FILING

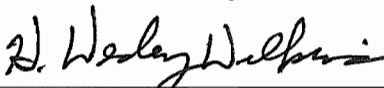
TO: MICHELLE RYAN, Esquire
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P. O. Box 19276
Springfield, IL 62794-9276

ORIGINAL

PLEASE TAKE NOTICE that on this date, I mailed to the Clerk of the Illinois
Pollution Control Board of the State of Illinois the following instruments/documents
entitled POST-HEARING RESPONSE OF RESPONDENTS.

Dated January 26, 2009.

Respectfully submitted,

BY: 

H. WESLEY WILKINS, Respondents Attorney

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5, 2006, IEPA Inspector, Garrison Gross, inspected the subject property.

Subsequently, although Mr. Gross did not do a title search to determine the specific ownership of the subject property, he did conduct a cursory inspection of property records at the Union County Courthouse and determined the equal ownership of said property by the Myers siblings. On January 3, 2007, with full knowledge that the property alleged to be in violation was equally owned by four (4) parties, the Illinois Environmental Protection Agency issued an Administrative Citation to only two (2) of the owners, being the Respondents, Bobby G. Myers and Donald D. Myers, without naming the remaining owners. Said Administrative Citation specifically alleged that the Respondents: 1) caused or allowed the open dumping of waste in a manner resulting in litter, in violation of 415 ILCS 5/21(p)(1); and 2) caused or allowed the open dumping of waste in a manner resulting in open burning, in violation of 415 ILCS 5/21(p)(3). On December 4, 2008, an administrative hearing was held at the Union County Courthouse on these citations, the transcript of which has been submitted or made available to this Board. The Respondents respectfully dispute not only the allegations of the Administrative Citation, but also the abuse of prosecutorial and administrative discretion in this IEPA enforcement action.

LEGAL ARGUMENT

- 1) *The Illinois Environmental Protection Agency has failed to prove that the Respondents caused or allowed the open dumping of waste in a manner resulting in litter, in violation of 415 ILCS 5/21(p)(1).*

In order for the Agency to prove this violation, it must prove each of the following elements: That the Respondents 1) "*caused or allowed*"; the 2) "*open dumping*" of; 3)

“waste”, in a manner resulting in 4) “litter”.

As previously stated, Donald D. Myers has operated a salvage operation on the property located at 3050 Mountain Glen Road in the vicinity of Cobden, Illinois. In recent years, he has been assisted in this operation by his son, Donald Myers, Jr. Pursuant to the operation of their salvage business, they have collected and salvaged numerous automobiles, trucks, trailers, tires, mobile homes, and various other vehicles, equipment and different items to provide for their livelihood. To be sure, the photographs submitted into evidence, without objection, depict the somewhat trashy condition of the Myers property. But this is a salvage business operated in a remote, rural area. And the photographs also clearly show that this property was not an open dump site as alleged, but rather a rural salvage business, containing what salvage operations do, namely salvage vehicles, salvage engine parts, salvage tires, a salvage mobile home, various other operable vehicles not in violation (a Case track-hoe), and vehicles/equipment clearly used for the purpose of operating a salvage business (truck with a cutting torch in the back). Even Mr. Gross acknowledged in his testimony that he saw evidence of a salvage operation, including the truck with a cutting torch used to “scrap” vehicles, and that vehicle components, like engines and transmissions, were being removed from automobiles on the site (see Transcript - Page 23, Line 14). Mr. Gross further acknowledged in his testimony that many of the items which he saw during his initial visit were no longer there during subsequent site inspections, again evidencing the fact that this was an operational salvage business. Accordingly, this site is not an “open dump” as alleged, but rather an ongoing rural salvage business operated solely by Donald Myers, Sr. and Donald Myers, Jr.

In her brief, opposing counsel correctly sights the definition of “**open dumping**” as “*the consolidation of **refuse** from one or more sources at a disposal site*”. However, she then incorrectly attempts to “connect-the-dots” by equating and/or defining “**refuse**” as “**waste**”, which includes ... “*any **garbage** or **other discarded material***”. Certainly “garbage” is waste. But saying that all “discarded material” is “refuse” and/or “waste” as referenced and applied to the facts of this case are both factually and legally incorrect as there is a clear distinction between the two.

To be sure, by its very nature, a salvage operation involves the collection and consolidation of “discarded material”, namely, items which someone either believes have no further usefulness or no longer want, but in which the salvage operator sees as having use and value. In the case at bar, this collection and consolidation of what could be considered as “discarded material” by Donald D. Myers, Sr., and his son, on the subject property, primarily consisted of used motor vehicles, vehicle parts, tires, equipment and/or other items collected for salvage, sale and reuse. In contrast, any old appliance, furniture, discarded household items and construction materials, and the domestic trash and garbage found/observed on the Myers property is, without question, “waste”, as used/defined in the statutes. However, there is no evidence that this “waste” was either placed there or allowed to be there by Mr. Myers and he specifically denies that he was or is responsible for the same either being there or remaining upon his property.

It is unfortunately not uncommon in rural areas, that these out-of-the-way, often isolated salvage operations often become unintended “open dumps”, not because of

the actions of the salvage operators, but because of those who dump garbage, waste and refuse on private property without permission. And as testified to by Donald D. Myers, Sr., in the case at bar, he has experienced continuing problems with people dumping junk, trash, litter, garbage, debris and waste on his property, all of which was without his permission, which illegal dumping he has previously cleaned-up and repeatedly reported to law enforcement, without any resulting arrests and/or prosecution (see Transcript - Page 37, line 11). And even Mr. Gross testified that he uncovered some evidence that “things” were being brought to the Myers property not by them (see Transcript - Page 24, Lines 3-4). Accordingly, the Respondents neither caused nor allowed the open dumping of “waste” on their property as alleged.

Perhaps even more significantly, in order to prove a violation of Section 21(p)(1) of the Act, the IEPA is required to prove that the open dumping of waste by the Respondents “resulted in *litter*”. In her brief, opposing counsel correctly states that “*litter*” is not statutorily defined in the Act, although she has provided a definition of “*litter*” which she submits is the proper definition according to “supporting case law”. Yet in *Miller vs. Pollution Control Board* (1994) Appellate Fourth District, 642 N.E.2d 475, “*litter*” was defined by the Court as “*material of little or no value which has not been properly disposed of.*”

In the case at bar, without question and by any definition, the trash, garbage, debris, etc. found on the property, which Respondents’ assert was placed there by others, is “litter”. However, also without question, the salvage vehicles, salvage engine parts, salvage tires, a salvage mobile home, various other operable vehicles not in violation (a track-hoe), and vehicles/equipment clearly used for the purpose of operating

a salvage business (truck with valid registration and license, with a cutting torch in the back) were all items or material which had considerable value, which served, in fact, as the basis for the livelihood of Donald D. Myers and his son.

In this testimony, Garrison Gross testified that many of the tires and other items which he saw on the Myers property during his initial inspection were gone when he reinspected the property (see Transcript - Page 16, Lines 18-20). And, in his testimony, Donald D. Myers testified that the vehicles, tires, etc. which were present on his property had value in that the vehicles had been junked, hauled-off and along with the tin, metal and steel in the tires which were on the property, all had been sold for scrap (see Transcript - Page 35, Line 20 through Page 36, Line 20). Accordingly, Respondents submit that these items which were admittedly possessed by Donald D. Myers on the subject property as a part of his salvage business are, by definition, not "litter" as they have value. And, contrary to opposing counsel's assertion that these items were "litter", simply because they had been exposed to the weather and overgrown with weeds, there is no legal requirement that salvage businesses have all of their salvage items or material covered or stored indoors, nor would it be uncommon for items in rural salvage yards to be overgrown with weeds, even over the course of a single growing season from April through September, especially when located in a remote or rural area, since the same are not regularly mowed or groomed.

Therefore, for the reasons hereinabove-stated, the Respondents submit that the IEPA has failed to meet its burden of proof in proving a violation of 21(p)(1) of the Act and submits that the same should be dismissed, with prejudice.

2) Respondents do not deny that personal landscape waste and tires were burned in a "burn pile" on the property, but deny that the same was in violation of Section 21(p)(3) of the Act.

For the reasons previously cited herein, Respondents deny that the tires which were burned in the burn pile were "waste" property under the Act, or that the open burning of landscape waste is in violation of the Act, and therefore, hereby submit that said Administrative Citation should be dismissed, with prejudice.

3) The prosecution of Bobby G. Myers, simply because he is one of four (4) owners of the subject property, without the prosecution of all other remaining owners, constitutes selective enforcement and prosecutorial abuse of discretion which is arbitrary, capricious, unconscionable, and unjust.

It is uncontroverted that Respondent, Bobby G. Myers, had absolutely nothing to do with the salvage business operated by his brother, Donald D. Myers, for 40 or more years on the former family farm located at 3050 Mountain Glen Road, Cobden, Union County, Illinois. IEPA Inspector Garrison Gross testified that he never saw Bobby Myers around the site during his three (3) inspections, nor was there any evidence that he was in any way involved in the operation of the salvage business. Bobby Myers also testified that he had never had any involvement whatsoever in the salvage operation during his more than 25 years as Union County Treasurer, which elected position he continues to hold (see Transcript - Page 30, Lines 22-24). He derived no income from the salvage business, never deposited, nor was ever involved with any of the items placed, found or removed from the property, and in fact, seldom, if ever even goes to the property (see Transcript - Page 32, Line 12 through Page 33, Line 4). His only "crime" was that he saw that the real estate taxes were paid on the family farm when none of his other three (3) siblings were responsible enough to do so. And for

that, he is now charged with IEPA Administrative Citations as a one-fourth (1/4) owner of the real property alleged to be in violation.

To be sure, if these violations have, in fact, been proven, which counsel submits they have not, then Respondent Donald D. Myers, as the operator of the salvage business, should be found responsible and required to pay the required penalties. But if Respondent Bobby G. Myers is also “convicted” of these violations simply because of his ownership interest in the property, then why were the other partial owners not also charged and prosecuted?

In her brief, the Special Assistant Attorney General concedes that in addition to the Respondents, the other Myers siblings, Harold Myers and Barbara Myers, are also liable for the alleged violations on the site because of their ownership interest in the property. She also concedes that Donald Myers, Jr., also should have been named as a party because he has been an operator of the salvage business for the last several years. She then, however, attempts to explain-away why this selective prosecution/enforcement occurred in this case while at the same time having the audacity to argue that this Board has neither the power nor the authority to insure that the prosecution of this case is done in a fair, equitable and justiciable manner. In short, this is simply not true.

Counsel does not argue that the failure to name Harold Myers, Barbara Cerney and/or Donald Myers, Jr., is a defense to the citations issued herein. But the Board has the responsibility to insure that the filing, enforcement and prosecution of IEPA Administrative Citations are conducted in a fair, equitable and just manner, according to the due process rights of the citizens of Illinois. Counsel for the Respondents has

been in the practice of law for some 29 years, previously serving as Union County State's Attorney for 12 years, as a Special Assistant Illinois Attorney General, as a Court-Appointed Special Prosecutor in eight (8) southernmost Illinois counties, and as a Municipal Attorney prosecuting ordinance violations for six (6) different southern Illinois municipalities. In addition, Counsel for the Respondents has been in private practice, representing criminal defendants charged with everything from speeding to first-degree murder, as well as respondents cited for administrative violations such as those charged herein. And with all due respect to the Special Assistant Attorney General, in all of my years of practice, the prosecution of Bobby G. Myers at all, and if so, the failure to also name as parties and prosecute his siblings, Harold Myers and Barbara Cerney, represents the most selective enforcement and abuse of prosecutorial authority and/or discretion which counsel for the Respondents has ever witnessed.

The site in question was inspected by Inspector Garrison Gross on three (3) separate occasions, first on May 13, 2005, then on December 5, 2006, and then sometime in 2008 (see Transcript Page 15, Lines 6-17). Opposing counsel explains in her brief that the Illinois EPA did not know of Harold Myers, Barbara Cerney or Donald Myers, Jr., at the time the inspection was conducted on December 5, 2006. However, no title search was done to discover the same, allegedly because of the strict time-frame of the Act which requires Administrative citations to be served on Respondents within 60 days after the date of the observed violation. However, title searches are readily available in Union County and no title search conducted in this county has ever taken more than 7-14 days. And, apparently it also didn't take Inspector Garrison Gross long to do his own search and discover all of the owners of the cited

property in listing "*Bobby G. Myers, et al*" (meaning "*and others*") in his written report submitted shortly after the December 5, 2006 inspection (which report has been admitted into evidence), with his testimony also evidencing the fact that he had determined that there were four (4) people who owned the cited property from the Quit-Claim Deed obtained from Union County records (which deed has also been admitted into evidence), clearly indicating that the property was owned by the Respondents and Harold Myers and Barbara Cerney (see Transcript - Page 17, Line 22 through Page 18, Line 4). Yet, in spite of this knowledge that all of the responsible parties were not named, the IEPA continued in the prosecution of this citation.

Throughout the prosecution of this citation, from and after December of 2006 to the present, the Respondent, Bobby G. Myers has attempted to correct and/or receive an explanation as to why he is being charged herein, and if it's because of his being a partial owner of the property, why the remaining owners are also not being charged. Opposing counsel argues that it was because of the "strict-time frame" of 60 days between the time of the observed violation and the service of the Administrative Citations upon the Respondents. But doesn't fairness, justice and due process require that all or none of the parties legally responsible for the alleged violations be charged, or none of them? Shouldn't the IEPA have a legal and ethical responsibility to determine the entirety of the ownership of the sited property before they arbitrarily choose who to cite and prosecute? And once the correct ownership of the property was discovered by the IEPA, shouldn't the IEPA have either timely amended or refiled their Administrative Citations to either delete Bobby G. Myers as a party or name the other owner/operators as parties, even if it would have required another site inspection and

report being generated by Garrison Gross, especially since the evidence herein clearly proves that he visited/revisited the property on multiple occasions anyway?

In closing, in Complaint's brief, opposing counsel argues that these questions and the absolute abuse of prosecutorial power, discretion and authority evidenced herein should be ignored by the Board. But to do so is to justify the unfair, inequitable and selective prosecution of the Respondents herein, which prosecution could have been easily corrected long ago, but which opposing counsel simply refused to correct, either because of the extra work which would be required of salaried state officials, or, worse yet, simply because "she didn't have to". Therefore, the Respondents submit that for the reasons stated above, the IEPA has failed to meet its burden of proof with respect to the two (2) Administrative Citations filed herein, and if the Board finds that either or both of the same have been proven, that Bobby G. Myers be dismissed as a party Respondent in this cause.

Respectfully submitted,

BOBBY G. MYERS and **DONALD D. MYERS**,
Respondents

BY: 

H. WESLEY WILKINS, their Attorney

PROOF OF SERVICE

I hereby certify that I did, on January 26, 2009, send by U. S. Mail, postage thereon fully prepaid, by depositing in the United States Post Office Box at Anna, Illinois, a true and correct copy of the foregoing pleading and/or instrument, on the following parties:

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Special Assistant Attorney General
Illinois Environmental Protection Agency
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Springfield, IL 62794-9276

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James R. Thompson Center
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January 26, 2009

Mr. John Therriault, Acting Clerk
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JAN 29 2009
STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

Re: **IEPA vs. BOBBY G. MYERS and DONALD D. MYERS** - Case No. AC 07-30;
IEPA No. 375-06-AC

Dear Mr. Therriault:

Please find enclosed an original and one (1) copy of my Post-Hearing Brief of Respondents and Notice of Filing. Please file the same for consideration by the Illinois Pollution Control Board and return a file-stamped copy of the same to me in the enclosed self-addressed, stamped envelope.

As always, your cooperation in this regard will be most appreciated and I will await your response.

Respectfully yours,



H. Wesley Wilkins

HWW:ww
Enclosures

cc: Michelle Ryan
Special Assistant Attorney General