ILLINOIS POLLUTION CONTROL BOARD
April 2, 2009

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 06-50
	)	(IEPA No. 98-06-AC)
MARK GATES,	)	(Administrative Citation)
Respondent.	)	

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

MARK GATES, RESPONDENT, APPEARED *PRO SE*.

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

Today the Board finds that Mark Gates (respondent) violated Sections 21(p)(1) and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2006)). The violations, which were alleged in an administrative citation issued by complainant, the Illinois Environmental Protection Agency (Agency), took place at a site located in the West 1/2 of the Southwest 1/4 of Section 8 in Township 21 North and Range 2 West of the 3rd Principal Meridian in Logan County. The site is known to the Agency as "Lincoln/Lewis" and is designated with Site Code No. 1078075001. The Board finds that respondent violated the Act by causing or allowing the open dumping of waste in a manner resulting in litter and the deposition of general construction or demolition debris. As described below, respondent is therefore subject to statutorily-mandated civil penalties of $1,500 per violation, for a total civil penalty of $3,000, 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 respondent may respond. After the time periods for the hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

Below, the Board first provides the legal framework for administrative citations. Next, the Board sets forth the procedural history of this case. This is followed by the Board's findings of fact and a summary of the parties' arguments. The Board then discusses the alleged violations and claimed defenses before rendering its legal conclusions.

LEGAL FRAMEWORK

Under the Act (415 ILCS 5 (2006)), 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 Agency or delegated local authority must serve the administrative citation on the respondent within "60 days after the date of the observed violation." 415 ILCS 5/31.1(b) (2006)); *see also* 35 Ill. Adm. Code 108.202(b). The Agency or delegated local authority also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. *See* 415 ILCS 5/31.1(c) (2006). To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. If the respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(1) (2006); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the administrative citation, but the complainant proves the alleged violations at hearing, the respondent will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500. Because the Act (415 ILCS 5/42(b)(4-5) (2006)) specifies the penalty for a violation in an administrative citation action, the Board cannot consider mitigating or aggravating factors when determining penalty amounts. *See, e.g.*, IEPA v. Stutsman, AC 05-70, slip op. at 2 (Sept. 21, 2006). However, if the Board finds that the respondent "has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty." 415 ILCS 5/31.1(d)(2) (2006); *see also* 35 Ill. Adm. Code 108.500(b).

PROCEDURAL HISTORY

The Agency filed an administrative citation on June 2, 2006, against three persons: respondent; Marla Lewis Gates; and Mark Kingsley Lewis. Because the Agency failed to timely serve the administrative citation on Marla Lewis Gates and Mark Kingsley Lewis, those two individuals were dismissed from this proceeding. IEPA v. Mark Gates, Marla Lewis Gates, and Mark Kingsley Lewis, AC 06-50 (Oct. 19, 2006).

Respondent filed a petition for review on July 18, 2006. On August 4, 2006, the Board issued an order finding respondent's petition timely but deficient, and ordering respondent to file an amended petition by September 5, 2006. When respondent failed to timely file an amended petition, the Board, on October 19, 2006, issued a default order against respondent, finding he violated Sections 21(p)(1) and (p)(7) of the Act as alleged and directing him to pay a civil penalty of $3,000.

On November 21, 2006, respondent filed a motion for reconsideration of the October 19, 2006 order, which the Board granted on December 21, 2006. At that time, the Board directed respondent to file an amended petition for review by January 22, 2007. The Board subsequently granted respondent several additional extensions to file an amended petition. On May 29, 2007, respondent filed an "Amended Response to Administrative Citation" (Am. Resp.), which the Board accepted for hearing in a June 21, 2007 order.

The hearing was held on January 23, 2008, at the Logan County Courthouse in Lincoln. Two witnesses testified at hearing: Michelle Cozadd, a field inspector with the Agency; and respondent. The Board cites the hearing transcript as "Tr. at _." One exhibit was admitted at hearing: the Agency's open dump inspection checklist, memorandum, site sketch, and photographs (Agency Exh.). On February 19, 2008, the Agency filed a post-hearing brief (Agency Br.). Respondent did not file a post-hearing brief, despite receiving an extension of the filing deadline, and respondent has not sought further extensions.

FACTS

On April 26, 2006, Agency field inspector Michelle Cozadd inspected Site No. 1078075001. Agency Exh. at 3. The site is located in a wooded area of Logan County, approximately one-half mile east of Union, off of County Road 2550 North. Tr. at 7; Agency Exh. at 1. The site, which is 14 or 15 acres in size, was owned by Marla Lewis Gates and her son, Mark Lewis, at the time of the inspection. Agency Exh. at 3; Am. Resp., Exh. D at 9. Respondent and Marla Lewis Gates were married in September 1997. Am. Resp. at 11. Respondent and Marla Lewis Gates entered into divorce proceedings on January 4, 2007, in the Circuit Court of the Eleventh Judicial Circuit, Logan County. Tr. at 14; Am. Resp., Exh. D at 1, 3.

No one was living at the site at the time of the April 26, 2006 inspection. Agency Exh. at 3. Most of the site is a wooded area. Tr. at 9. The site has a driveway running through it and an open space where a storage garage is located. Tr. at 9; Agency Exh. at 3, 5. Respondent built the storage garage, the construction of which began in July 1997 and took several years to complete. Am. Resp. at 11, Exh. D at 9, 18, Exh. F at 4. The storage garage is 60 feet wide, 112 feet long, and 22 feet tall, and is made of concrete blocks with a concrete floor. Am. Resp. at 7, 18. Respondent has a construction business. Am. Resp., Exh. D at 13. Respondent posted "no hunting" and "no trespassing" signs at the site. Am. Resp. at 3.

Cozadd conducted five previous inspections of the site, beginning in 1998. Tr. at 7-8. Since 1998, respondent has corresponded with and been the only person interviewed on-site by the Agency. Tr. at 8; Agency Exh. at 3; Am. Resp. at 3. Since the Agency inspections began, respondent has informed the Agency that it is allowed to inspect and take pictures of the site only if he is present. Tr. at 14; Am. Resp. at 3.

During the April 26, 2006 inspection, the following items were located outside on the site, near the site's entrance, which is on the north side of the property: a mobile home (northern mobile home); a large rusted storage box; a pile of vinyl siding on a pallet covered by tarps (held down with dimensional lumber) and overgrown with weeds; a red wagon; a metal toolbox; a pile

of corrugated metal siding and a metal table; two piles of rock overgrown with weeds; a pile of neatly stacked bricks on a wooden pallet, next to which is a pile of telephone poles (on top of dimensional lumber) overgrown with weeds; and another pile of telephone poles, along with damaged dimensional lumber, all overgrown with weeds. Tr. at 9; Agency Exh. at 3, 5-8 (photo 1-6); Am. Resp. at 6. These materials were present and in the same locations at the time of the prior site inspection on May 24, 2005. Agency Exh. at 3. In addition, these materials have been in the same vicinity of the site since Cozadd's first inspection of the property in 1998. Tr. at 9.

The northern mobile home, large storage box, corrugated metal siding, metal table, and red wagon were placed on the site by the former owner of the site, Kingsley Lewis, who passed away in August 1991. Am. Resp. at 5-7. Kingsley Lewis also placed at least some of the telephone poles and dimensional lumber on the site. *Id*. at 6. Respondent placed the vinyl siding on the site. *Id*. at 7. Respondent put the vinyl siding on pallets and covered the materials in approximately 1999. *Id*. at 5-6. Mark Lewis owns the metal tool box. *Id*. Marla Lewis Gates owns the northern mobile home and the storage box. Am. Resp., Exh. D at 9-10.

The April 26, 2006 inspection revealed a second mobile home at the site. This mobile home (southern mobile home), which has been on the site since about 2002, was located along the driveway at the southern end of the site. Tr. at 9-10; Agency Exh. 3 at 3, 5-9 (photo 7). Plywood for covering some of the southern mobile home's windows had fallen partially or completely off of the facade. Agency Exh. 3 at 9 (photo 7).

The rest of the materials observed during the April 26, 2006 inspection were located outside, around the storage garage. Tr. at 10; Agency Exh. at 4, 5. These materials included: vinyl siding; wooden pallets; scrap metal, including rebar; damaged drywall; damaged dimensional lumber; a pile of gravel; axles; a metal tool box; used tires; a metal bathtub; shingles; and concrete blocks. Tr. at 10; Agency Exh. at 4, 9-13 (photos 8-16). The materials have been present since 2002 and were scattered on the grounds next to the storage garage. Tr. at 10; Agency Exh. at 9-13 (photos 8, 10-16). As of the April 26, 2006 inspection, a mobile home, a vehicle, and some scrap metal had been removed from the site by respondent since the May 24, 2005 inspection. These items had been located near the storage garage. Tr. at 10; Agency Exh. at 10 (photo 9); Am. Resp. at 8.

Respondent and Marla Lewis Gates agreed in the divorce proceeding that he would remove the storage garage from the site within one year and remove the surrounding debris from the site within six months. Am. Resp. at 7, Exh. D at 9-10, 20. However, since May 11, 2007, respondent has been barred from the site by a court order entered in the divorce proceeding. The court order gave Marla Lewis Gates exclusive possession of the site. Am. Resp. at 7, 12-13, Exh. D at 1, 24-26; Tr. at 14-15.

PARTIES' ARGUMENTS

Agency's Position

The Agency argues it has demonstrated that respondent caused or allowed the open dumping of waste at the site. Agency Br. at 1. According to the Agency, respondent was in

"operational control" of the site on April 26, 2006, and therefore "caused or allowed" open dumping. *Id*. at 1-2, citing Tr. at 8 and Am. Resp. In support, the Agency refers to respondent "indicating future intentions with respect to site," his "concerns about Respondent's lack of presence during April 26, 2006 inspection," and his "admissions to placing some of the materials at the site." Agency Br. at 2. The Agency also states that respondent was "the only person with whom the inspector had any communication regarding the site" through the six Agency inspections spanning from 1998 to 2006. *Id.*

The Agency next asserts that "open dumping" occurred. The testimony and the inspection report, continues the Agency, show that "abandoned mobile homes, a large storage box, vinyl siding, a metal table, bricks, telephone poles, drywall, dimensional lumber, shingles, scrap metal, a metal bathtub, used tires, wood pallets and rebar" were on the site during the April 26, 2006 inspection. Agency Br. at 2. The Agency maintains that "waste" under the Act was present because these materials "had been exposed to the weather for several years, and at least some of them had been in an unchanged condition since the original 1998 inspection." *Id*.

The Agency further argues that the open dumping resulted in "litter." Agency Br. at 2. The Agency maintains that the mobile homes, siding, metal, bricks, drywall, lumber, shingles, tires, and pallets constitute "litter" under Section 21(p)(1) of the Act, resulting in respondent's violation of that section. *Id*.

The Agency also asserts that the open dumping resulted in the deposition of construction or demolition debris in violation of Section 21(p)(7) of the Act. The Agency notes the field inspector's observations of the allegedly abandoned mobile homes, the metal bathtub, and the dimensional lumber, and cites these materials, along with the bricks, drywall, siding, shingles, and scrap metal, as constituting "general construction or demolition debris." Agency Br. at 3. The Agency argues that as used in the Act's definition of "general construction or demolition debris" (415 ILCS 5/3.160(a) (2006)), a mobile home is a "structure" and a metal bathtub is "plumbing fixture." Agency Br. at 3. The Agency concludes that "[a]ll of these wastes meet the definition of 'construction or demolition debris' for purposes of Section 21(p)(7) of the Act," resulting in its violation by respondent. *Id*.

The Agency then addresses respondent's expressed intent to use some of the alleged waste. Agency Br. at 3, citing Am. Resp. The Agency points out that the materials at the entrance "had not moved or been used in eight years" and adds that a plan for using material at some future date is not determinative of whether material is waste. Agency Br. at 3. The Agency further notes that a person can "cause or allow a violation of the Act without knowledge or intent." *Id*. at 3-4. Finally, as for respondent's lack of access to the property, the Agency observes that respondent's divorce proceedings commenced on January 4, 2007, "more than eight months *after* the inspection on which this Administrative Citation is based." *Id*. (emphasis in original).

Respondent's Position

Respondent claims that the materials on the site are not "waste" because he intends to use them and they have value. Am. Resp. at 4, 6-9. For example, he intends to use the vinyl siding

to "cover" the storage garage. *Id*. at 7-8. He states that the scrap metal is "going to be reused or recycled" (*id*. at 8); the damaged drywall is "excellent for road base application" (*id*.); the piles of rock are valued at "$200.00 per truck load" (*id*. at 6); the metal toolbox "will be recycled if not reused" (*id*. at 9); the weathered lumber will be "reused" (*id*.); the metal bathtub "sell[s] new for several hundred dollars" (*id*.); the shingles and concrete blocks are on pallets and will be used (*id*.); the axles are "metal product[s] to be used in making a trailer" (*id*.); and the equipment "is not discarded, as I paid for and inten[d] to use all items I have there" (*id*.).

Respondent argues that the southern mobile home is "neither abandoned [n]or as stated 'appeared discarded' [and] . . . is licensed and currently sitting in abeyance due to divorce and legal issues in local court." Am. Resp. at 7-8. According to respondent, the northern mobile home had been used by Kingsley Lewis and is still has "heat and electricity hooked up." *Id*. at 10.

Respondent also raised a number of arguments purportedly absolving him of liability: some of the materials were placed on the site by Kingsley Lewis prior to respondent's relationship with Marla Lewis Gates (Am. Resp. at 5-7); some materials have been stored off of the ground and covered in accordance with Agency instructions (*id*. at 5-7); respondent's inability to remove items because of lack of access to the site based on a court order in the divorce proceeding (*id*. at 7, 9, 12-13); and respondent's standing request that inspections of the property by the Agency be conducted only in his presence (Tr. at 12; Am. Resp. at 3).

DISCUSSION

Alleged Violations

The Agency maintains that on April 26, 2006, respondent violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2006)) at the site. Section 21(p) of the Act provides in relevant part:

> 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;
>
> ***
>
> (7) deposition of:
>
> (i) general construction or demolition debris as defined in Section 3.160(a) of this Act . . . . 415 ILCS 5/21(p)(1), (p)(7)(i) (2006)).

Open Dumping of Waste

As a threshold matter, to prove a violation of Section 21(p), the Agency must first prove a violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2006)). Section 21(a) provides that

"[n]o person shall: Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2006). "Open dumping" 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 (2006). "Refuse" means "waste." 415 ILCS 5/3.385 (2006). The Act defines "waste" as:

> [A]ny 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 . . . . 415 ILCS 5/3.535 (2006).

The Act defines "sanitary landfill" as:

> [A] facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation. 415 ILCS 5/3.445 (2006).

The Board finds that as of the April 26, 2006 inspection by the Agency, "waste" had been "open dumped" at the site. It is not disputed that materials from one or more sources were consolidated on the site. The April 26, 2006 inspection revealed numerous items situated around the site's entrance and storage garage. The Board "cannot find that every one of these items at the property had value, was being handled consistent with legitimate re-use, or was being promptly removed for proper off-site disposal or recycling." IEPA v. Michael Gruen and Jon Eric Gruen, d/b/a Jon's Tree Service, AC 06-49, slip op. at 12 (Jan. 24, 2008).

Even if there was some valuable material being managed properly at the time of the inspection, the Board finds that at least some of the items consolidated there and identified during the inspection were "discarded" and thus "waste" under the Act. *See* Stutsman, AC 05-70, slip op. at 7-8; IEPA v. Carrico, AC 04-27, slip op. at 7 (Sept. 2, 2004); IEPA v. Cadwallader, AC 03-13, slip op. at 4 (May 20, 2004); County of Jackson v. Easton, AC 96-58, slip op. 2, 4 (Dec. 19, 1996); *see also* IEPA v. Moreton, AC 04-51, slip op. at 7 (Feb. 1, 2007) ("Even assuming that the site contained a portion of valuable material being managed properly for salvage or recycling, the majority of the items consolidated there and identified during the inspection were 'discarded' and thus 'waste' under the Act."); Northern Illinois Service Co. v. IEPA & PCB, 381 Ill. App. 3d 171, 177, 885 N.E.2d 447, 452 (2nd Dist. 2008) (market value of item is not itself determinative of whether item has been discarded).

The Board finds that at least the following items were discarded materials and therefore constitute waste: damaged dimensional lumber overgrown with weeds and present near the entrance for roughly eight years; and scrap metal, rebar, damaged drywall, and damaged dimensional lumber, all scattered on the ground next to the storage garage and present since 2002. These items were not protected from the elements and respondent's claims of intended

future use for the materials are not dispositive of whether the materials are waste: "[s]imply asserting an intended use for an item at some unspecified date in the future cannot insulate the item from ever becoming 'discarded' or 'disposed of.'" Gruen, AC 06-49, slip op. at 10-12 (inoperable vehicles were "discarded" and thus "waste" where, despite intent to repair vehicles, they exhibited signs of not having been moved for a substantial period of time); *see also* County of Sangamon v. Daily, AC 01-16, 01-17 (consol.), slip op. at 10, 12-13 (Jan. 10, 2002) (despite expressed "intention to use every single discarded item . . . numerous items were not in use, were not useable in their current condition, and were not stored in such a way as to protect any future use"), *aff'd. sub nom*. Everett Daily v. County of Sangamon and PCB, No. 4-02-0139 (4th Dist. Sept. 18, 2003) (unpublished order under Illinois Supreme Court Rule 23). It is also undisputed that the site does not meet the requirements for a sanitary landfill.

Cause or Allow

That respondent may never have intended to violate the Act is of no aid to him. The Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. In People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), the court stated that "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." Fiorini, 143 Ill. 2d at 336, 574 N.E.2d at 618; *see also* Freeman Coal Mining Corp. v. PCB, 621 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).

Respondent did not own the site. Marla Lewis Gates and Mark Lewis were the owners of the site. Ownership of the property, however, is not a prerequisite to violating Section 21(p) of the Act. IEPA v. Dan Cadwallader, AC 03-13, slip op. at 6 (May 20, 2004). Rather, a complainant "must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793-96, 618 N.E.2d 1282, 1286-88 (5th Dist. 1993); *see also* Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974).

Respondent built and used the storage garage on the site; deposited materials on and removed materials from the site; and posted signs banning others from entering the site. Respondent was present during many Agency inspections of the site over the years and insisted upon being present for all such inspections. Respondent was the sole Agency contact person for the site since 1998. Respondent agreed in the divorce proceeding with Marla Lewis Gates that he would remove the storage garage and the surrounding debris from the site. Agency inspector Cozadd testified that respondent appeared to be in "operational control of the site" at the time of the inspection. Tr. at 8. The Board finds that respondent was in control of the site.

Respondent does not dispute that he deposited debris on the ground around the storage garage. Further, the Board has held that a violation of Section 21(p) for "allowing" open dumping can be found based on present inaction by a current operator to remedy a previously caused violation. For example, in IEPA v. Rawe, AC 92-5 (Oct. 16, 1992), the Board held:

> [P]assive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. *** Present inaction on the part of the landowner to remedy the disposal of waste that was previously placed on the site, constitutes "allowing" litter in that the owner allows the illegal situation to continue. Rawe, AC 92-5, slip op. at 6; *see also* Dan Cadwallader, AC 03-13, slip op. at 6 (current site operator liable for letting the waste dumped by prior owner and operator remain on the site while under his control).

Even if Kingsley Lewis placed some of the items on the site, the Board finds that respondent "allowed" open dumping by letting them remain for so long on a site under his control. Rawe, AC 92-5, slip op. at 6; IEPA v. Douglas S. Carrico, d/b/a Carrico's Auto Heap, AC 04-27, slip op. at 8-9 (Sept. 2, 2004) ("the Board has held that a current owner or operator can be found to have 'allowed' litter . . . by failing to remove an accumulation of refuse for which that person was not initially liable"); IEPA v. M.K. O'Hara, AC 94-96, 94-97 (consol.), slip op. at 6 (Apr. 6, 1995).

Additionally, it is not a defense to liability that some cleanup work had been performed before the inspection, or that respondent was barred from the site roughly one year after the inspection. "The 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 . . . ." IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990).

The Board finds that respondent caused or allowed the open dumping of waste.

Litter

In Miller v. PCB, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994), the court stated:

> Given its ordinary meaning, "litter" refers to material of little or no value which has not been properly disposed of. The examples of litter set forth in the Litter Control Act [citation omitted] provide additional guidance. Miller, 267 Ill. App. 3d at 168-69, 642 N.E.2d at 483.

The Board has adopted the definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See* St. Clair County v. Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991). The Litter Control Act defines "litter" as:

> [A]ny discarded, used or unconsumed substance or waste [and] 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) (2006).

The damaged dimensional lumber, scrap metal, and damaged drywall identified during the April 26, 2006 inspection were discarded and constituted "litter." Accordingly, the Board finds that respondent violated Section 21(p)(1) of the Act by causing or allowing the open dumping of waste in a manner resulting in litter.

Deposition of General Construction or Demolition Debris

The Act defines "general construction or demolition debris" in part as follows:

> (a) "General construction or demolition debris" means 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 or other 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. 415 ILCS 5/3.160(a) (2006).

The damaged dimensional lumber, rebar, and damaged drywall on the site constituted general construction or demolition debris. The Board therefore finds that respondent violated Section 21(p)(7) of the Act by causing or allowing the open dumping of waste in a manner resulting in the deposition of general construction or demolition debris.

Civil Penalty and Hearing Costs

The Agency seeks the statutory $1,500 civil penalty per violation, for a total of $3,000, as well as hearing costs. Because respondent violated Sections 21(p)(1) and (p)(7) of the Act, and those violations were not the result of "uncontrollable circumstances" (415 ILCS 5/31.1(d)(2) (2006)), the Board now discusses civil penalties and hearing costs. Both are addressed in Section 42(b)(4-5) 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)(4-5) (2006).

There is no indication in the record that either of the violations found today is a second or subsequent adjudicated violation of such provision for respondent. Therefore, the civil penalty for these first violations of Sections 21(p)(1) and (p)(7) is statutorily set at $1,500 for each violation, totaling $3,000. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500(b)(2).

In addition, by unsuccessfully contesting the administrative citation at hearing, respondent also must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500(b)(3). However, no information on those costs is in the record. The Agency and the Clerk of the Board are therefore each ordered to file a statement of costs, supported by affidavit, and to serve the filing on respondent. Respondent will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that respondent violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing the open dumping of waste in a manner resulting in litter and the deposition of general construction or demolition debris. Having found the violations in this administrative citation action, respondent must pay a civil penalty of $3,000 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 respondent may respond. After the time periods for the filings on hearing costs have expired, the Board will issue a final opinion and order imposing the civil penalty on respondent and assessing against him any appropriate hearing costs. The final opinion and order will constitute final action by the Board.

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

ORDER

1. The Board finds that respondent violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2006)).

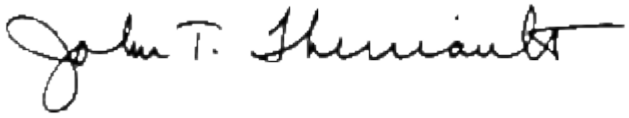
2. By May 4, 2009, the Agency must file a statement of its hearing costs, supported by affidavit. By May 4, 2009, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit.

3. Within 21 days after service of the filings required by paragraph 2 of this order, respondent may file with the Board a response challenging the claimed costs. Respondent must also serve any such response on the Agency.

4. Within 14 days after service of any response permitted under paragraph 3 of this order, the Agency may file a reply to the response.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on April 2, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board