

ILLINOIS POLLUTION CONTROL BOARD
April 1, 2010

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| THE ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, INC., |) | |
| |) | |
| Complainant, |) | |
| |) | AC 08-27 |
| v. |) | (IEPA No. 51-08-AC) |
| |) | (Administrative Citation) |
| HIRAM VANDERHEIDEN JUNIOR, |) | |
| |) | |
| Respondent. |) | |

INTERIM OPINION AND ORDER OF THE BOARD (by G.L. Blankenship):

Today the Board finds that Hiram Vanderheiden, Jr. (Mr. Vanderheiden) violated Sections 21(p)(1) and (p)(7) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7)(2008)). The violations, alleged in a citation issued by the Illinois Environmental Protection Agency (Agency), occurred at Mr. Vanderheiden's property, known to the Agency as Manito/Vanderheiden, and located at 510 N. Park Ave., Manito, in Mason County. The Board finds that Mr. Vanderheiden violated the Act by causing or allowing open dumping of litter and general and/or construction or demolition debris.

After finding the violations in this interim opinion and order, the Board directs the Agency and the Clerk of the Board to file hearing cost documentation, to which Mr. Vanderheiden 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.

In this interim opinion and order, the Board first describes the administrative citation process, the procedural history and the facts of this case. The Board then sets forth the pertinent provisions of the Act, summarizes the arguments of the parties as proffered in post-hearing briefs and summarizes the alleged violations, before then addressing the issue of penalties. Finally, after finding the violations, the Board directs the Agency and the Clerk of the Board to provide hearing costs documentation, to which Mr. Vanderheiden may respond. After the time periods for the hearing costs filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate costs.

ADMINISTRATION CITATION PROCESS

Section 31.1 of the Act authorizes the Illinois Environmental Protection Agency (Agency) and units of local government to enforce specified provisions of the Act through an administrative citation (AC). 415 ILCS 5/31.1 (2008). The Agency, or a unit of local government which is a delegated authority of the Agency, must serve the AC on Mr. Vanderheiden within "60 days after the date of the observed violation," (415 ILCS 5/31.1(c) (2008) and must file a copy of the AC with the Board no later than ten days after serving Mr.

Vanderheiden. 415 ILCS 5/31.1(c) (2008.) To contest the AC, Mr. Vanderheiden must file a petition with the Board no later than 35 days after being served with the AC. If Mr. Vanderheiden fails to do so, the Board must find that Mr. Vanderheiden committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(2)(2008); 35 Ill. Adm. Code 108.204(b), 108.406.

If Mr. Vanderheiden timely contests the AC, but the complainant proves the alleged violations at hearing, Mr. Vanderheiden will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. 415 ILCS 5/42(4, 4-5)(2008). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed (e.g. 415 ILCS 5/42(b)(1-3)), Section 42 sets specific penalties for administrative citations. 415 ILCS 5/42 (4, 4-5) (2008). Thus, in cases such as this, the Board has no authority to consider mitigating or aggravating factors in its determination of penalty amounts. *Id.* However, “if the Board finds that the person appealing the [administrative] citation 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) (2008)).

PROCEDURAL HISTORY

On March 31, 2008, the Agency timely filed an administrative citation (AC) against Hiram Vanderheiden Jr. On April 29, 2008, Mr. Vanderheiden filed a petition to contest the administrative citation. The Board accepted the petition for review on June 15, 2008.

A hearing was held before Board Hearing Officer Carol Webb on November 12, 2009. At that hearing, Paul Eisenbrandt (Mr. Eisenbrandt), an inspector with the Agency, testified. Hearing Transcript (Tr.) at 5. The Hearing Officer set a schedule for filing briefs, requiring the Agency to file a brief by December 15, 2009. *Id.* at 28. The Hearing Officer directed Mr. Vanderheiden to file a brief by January 11, 2010. *Id.* The Agency timely filed a brief that was received December 15, 2009 (Br.). Mr. Vanderheiden did not file a brief.

FACTS

Mr. Vanderheiden owns a property located at 510 N. Park Ave., Manito, in Mason County. This property is commonly known to the Agency as Manito/Vanderheiden and designated as Site Code No. 1258075004. AC at 1. The site is an open dump operating without a permit. *Id.* On February 7, 2008, Mr. Eisenbrandt inspected the site. *Id.*; Tr. at 4.

Mr. Eisenbrandt took fifty-one photographs of the site, which he described in his testimony. Tr. at 8-25. The photographs show the contents of Mr. Vanderheiden’s lot, which includes an old home, a separated garage, a shed, and a metal shed. The home and garage are in need of repair. *Id.* at 9.

The garage’s front wall and southwest corner are surrounded by debris. Ex. 1 at Photo 001, Photo 004. Photograph Two shows a closer view of the items in front of the garage. These items include at least twenty stacked cinderblocks, scrap metal, lawn tools, wood tongue and

grove siding, a torn plastic garbage can, and an engine block. *Id.* at Photo 002. Photograph Three shows the dilapidated garage. *Id.* at Photo 003. The garage is missing its roof, and the ground inside the garage is completely filled with miscellaneous debris. *Id.*

Photograph Six is a close-up view of several garden hoses, a plastic cooler, a stack of roofing shingles and plastic lawn chairs that are stacked near a tree. Ex. 1 at Photo 006. Near another tree on the property, there is a weathered gasoline can, two weathered window units, and a black metal bucket. *Id.* at Photo 007. Another view of the tree shows that there is also a blue bin and miscellaneous automotive parts at the base of the tree. *Id.* at Photo 011. Photograph Nine shows two lawnmowers and miscellaneous debris that surrounds a pile of dirt in the yard. *Id.* at Photo 009.

Photograph Fourteen is a view between the house and the covered trailer. Ex. 1 at Photo 014. It shows a bucket of roof cement, storm drains, glass windows and wooden ladders. *Id.* A photograph showing the front of the trailer shows additional items of chain link fencing, boxes of nails and construction materials. *Id.* at Photo 018.

On the northwest side of the house, Mr. Eisenbrant observed several pallets of stacked shingles and roofing paper, and an air conditioner. Ex. 1 at Photo 019. Photograph Twenty shows the rear view of the garage. *Id.* at Photo 020. To the rear of the garage, there are stacks of lumber, vinyl siding and sheet metal. There are also wheel barrows and miscellaneous debris behind the garage. *Id.* Photograph Twenty-One shows a stack of plywood covered with a blue tarp. *Id.* at Photo 021. Photograph Twenty-Two shows a truck bed trailer, two boats, and miscellaneous debris. *Id.* at Photo 022. There are vehicle parts and miscellaneous waste around the truck bed trailer. *Id.* at Photo 023. Mr. Vanderheiden's property also contains a camper, a trailer, and stacks of sheet metal. *Id.* at Photo 025.

The tree line to the east of the house is littered with building materials, truck toppers, trailers, ladders, storage boxes, twenty-seven tires, and miscellaneous waste. Ex. 1 at Photo 027. Photographs Twenty-Nine and Thirty show another tree line on the property. *Id.* at Photo 029 and 030. The tree line is littered with truck toppers, scrap metal, black corrugated plastic drain pipe, and other litter.

On the west side of the house there is a pickup truck, an on rim used tire, three wooden ladders and miscellaneous debris. Ex. 1 at Photo 032. Photograph Thirty-Three shows a view behind the house of a green snowmobile and a weathered shower stall. *Id.* at Photo 033. Photograph Thirty Four shows another view of the house, heavy timbers, two engines and motor vehicle parts. *Id.* at Photo 034. In the scrub trees, Mr. Eisenbrandt observed more truck trailers and stacked shingles. *Id.* at Photo 035.

On the north side of the property is a red trailer, a truck bed trailer, snow fencing, a truck storage box and a tarp. Ex. 1. at Photo 036. Photographs Thirty-Seven, Thirty-Eight and Forty-One show miscellaneous waste that Mr. Vanderheiden is storing in the tree line. *Id.* at Photo 037, 038 and 041. Mr. Eisenbrant observed a camper, a trailer, piles of scrap metal, and miscellaneous waste in the northeast corner of the site. *Id.* at Photo 039.

Photograph Forty-Two shows the east end of the property which contains a large flat bed trailer, four bicycles and several snowmobiles covered with green tarpaulins. Ex. 1 at Photo 042. Here, Mr. Eisenbrandt observed wooden ladders, bicycles, a green rotary tiller and miscellaneous debris. *Id.* at Photo 043. Photograph Forty-Four shows scrap metal, boats, a blue van, two boats and an axle. *Id.* at Photo 044. Mr. Eisenbrandt also observed a gray Acura with a broken rear window on the property. *Id.* at Photo 045. There is a sheet metal air duct, another wheel barrow and debris on a small dirt hill. Mr. Eisenbrandt observed a large exterior light, dimensional lumber and miscellaneous items near the eastern section of the site. Photograph Forty-Eight shows landscape waste in the rear yard. *Id.* at Photo 048.

Mr. Eisenbrandt also noticed charred waste on the property that indicated that Respondent had burned landscape waste on the property at one point. Ex. 1 at Photo 005, 048, 049.

SUMMARY OF RESPONDENT'S TESTIMONY

Mr. Vanderheiden testified that the pictures show the prior state and the various items that he had accumulated. Tr. at 26. He also testified that he had undertaken efforts to clean up the property, but that the cleanup was not completed. *Id.* at 27.

STATUTORY BACKGROUND

Section 3.05 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 sanitary landfill." 415 ILCS 5/3.05 (2008).

Section 3.385 of the Act defines "refuse" as "waste." 415 ILCS 5/3.385 (2008).

Section 3.535 of the Act defines "waste" as:

any garbage, ... 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 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. . . . 415 ILCS 5/3.535 (2008).

Section 3.160(a) of the Act defines "general construction or demolition debris" as:

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: 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 corrugated cardboard, piping or metals incidental to any of those materials. 415 ILCS 5/3.160(a).

Section 21(a) of the Act states that no person shall “[c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a)(2008).

Section 21(p) of the Act provides in relevant part 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 dumping; ...
- (7) deposition of:
 - (i) general construction or demolition debris as defined in Section 3.160(a) of this Act; or
 - (ii) clean construction or demolition debris as defined in Section 3.160(a) of this Act.

The prohibitions specified in this subsection (p) shall be enforceable ... by administrative citation under Section 31.1 of this Act....” 415 ILCS 5/21(p)(1),(3),(7) (2008)

AGENCY’S ARGUMENTS

The Agency asserts that Mr. Vanderheiden violated Sections 21(p)(1) and (p)(7) of the Act by open dumping of litter and construction or demolition debris. (415 ILCS 5/21(p)(1), (7) (2008)). Although the Agency cited respondent for “open burning,” a violation of Section 21(p)(3) of the Act in the Administrative Complaint, it determined that the “open burning” had not recurred recently on the date of the February 7, 2008 inspection. Agency’s Post Hearing Brief of Complainant (Br.) at 1.

In support of its argument that respondent violated Sections 21(p)(1) and (7), the Agency relies on the Act’s definition of “open dumping,” “refuse” and “waste.” More specifically, in support of its argument that Respondent’s conduct constituted “open dumping,” the Agency notes that the February 7, 2008, inspection revealed that there were numerous items on the property including:

cinder block, buckets, automotive parts, wood siding, lawn tools, floor jacks, commercial lights, PVC conduit, weathered lumber, roofing materials, Christmas lights, wooden ladders, trailers, an air conditioner, wheelbarrows, boats, camper, parts washer, scrap metal, ductwork, rusty drum, tanks, tires, drain tile, snowmobiles, shower stall, snow fence, snowplows, scaffolding, fence posts, sawhorse, bicycles, wire, landscape waste and other miscellaneous items. Br. at 2.

Additionally the Agency wrote that some of these items were “covered with algae and dust” and vegetation, which indicated that the items had been there for awhile. *Id.* Based on this evidence and the fact that Mr. Vanderheiden did not contest the allegations, the Agency concluded that “open dumping” had occurred. *Id.*

The Agency relies on the Board’s definition of litter found in the Litter Control Act to assert that the items that Mr. Vanderheiden left on his property were litter. The Agency used the Acts definition of “construction or demolition debris” noting that the cinder block, wood siding, windows, PVC conduit, weathered lumber and roofing materials are included in that definition. *Id.* at 3.

BOARD DISCUSSION

The Board notes that the facts of this case are uncontested. Mr. Vanderheiden acknowledges that the photographs accurately show the various items that he accumulated over the years. Tr. at 26-27.

Open Dumping of Waste

The record shows that an Illinois EPA inspector observed that respondent had accumulated various items on his property including cinder blocks, buckets, lawn tools, automotive parts, shingles, scrap metal, milk crates, weathered lumber, Christmas lights, screen doors, window pane, wooden ladders, trailers, an air conditioner, wheelbarrows, boats, a fiberglass shower covered with dust and algae, snowplows, and fencing. Tr. at 26-27.

The photographs show that Mr. Vanderheiden allowed these items to become weathered, covered in algae and dust, or overgrown with vegetation and suggests that the items were not being used. Tr. at 13, 14, 16, 20, 23. Therefore, the Board finds that Mr. Vanderheiden’s conduct was open dumping as defined in Section 3.05 of the Act. 415 ILCS 5/3.05 (2008).

Litter

The Act does not define “litter.” However, previous Board decisions defined litter using the statutory definition in the Illinois Litter Control Act, which 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, ... or anything else or an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly.” 415 ILCS 105/3(a) (2008). *See St. Clair County v. Louis I. Mund*, PCB 90-64, (Aug. 22, 1991).

When Mr. Eisenbrandt, the Agency Inspector, investigated the property, he viewed numerous examples of improper disposal on Mr. Vanderheiden’s property. For example, Photograph Two shows that cinder blocks, scrap metal, lawn tools, grove siding, a torn plastic garbage can and an engine block were in front of the dilapidated garage. Ex. 1 at Photo 002. The garage on the property was missing half of its roof, exposing the miscellaneous debris inside the garage to the elements. *Id.* at Photo 003. Additional waste was dumped outside of the

garage. *Id.* at Photo 005. There were several sections of garden hose, a plastic cooler, a stack of roofing shingles and plastic lawn chair near the south of the house. *Id.* at Photo 006. Photograph Seven shows a weathered gasoline can, two weathered window units and a black metal bucket. The weathering of the gasoline can and window units indicate that they were exposed for some time. *Id.* at Photo 007. There were two lawn mowers near a pile of debris that were partially covered in snow at the time of the inspection. *Id.* at Photo 009. Between the house and the trailer, there were a bucket of roof cement, storm doors, glass windows, and wooden ladders. *Id.* at Photo 014. Photograph Fifteen shows the porch which is missing the roof and rafters. Mr. Eisenbrandt testified that the porch was full of miscellaneous items that were exposed to the weather. *Id.* at Photo 015.

A trailer on the property was surrounded by ladders, window units, chain link fencing and boxes of miscellaneous nails. *Id.* at Photo 018. To the north of the trailer, the yard was littered with a cooler and numerous boxes of miscellaneous items. Photograph Twenty shows stacks of lumber, siding and sheet metal along with miscellaneous debris and wheel barrows. *Id.* at Photo 020.

Photograph Thirty-Three shows a weathered shower stall. Ex. 1 at Photo 033. At trial, Mr. Eisenbrandt testified that the shower stall was covered in dust and algae indicating that it had not been used for some time. Tr. at 20. Photograph Thirty-Four shows heavy timber, two engines and motor vehicle parts that were behind the house. Ex. 1 at Photo 034. Miscellaneous waste has been disposed of in the tree lines. *Id.* at Photo 037, 038, 039, 040, and 041.

The Board concludes that these items have been improperly disposed of or abandoned. Therefore, the Board finds that the disposal of these items constitutes “litter” as defined under the Illinois Litter Control Act. 415 ILCS 105/3(a)(2008). The Board also finds that the respondent violated Section 21(p)(1) of the Act.

General Construction or Demolition Debris

The Act defines “construction or demolition debris” to include wood, shingles, wall covering and roofing materials. *See* 415 ILCS 5/3.160(a) (2008). These items, among others meeting the definition of “construction or demolition debris,” were all found on Mr. Vanderheiden’s property. For example, Photograph Two shows wood tongue and groove siding. Ex. 1 at Photo 002. Roofing shingles are in the middle of the yard. *Id.* at Photo 006. On the northwest side of the house, Mr. Eisenbrandt observed several pallets of stacked shingles and roofing paper. *Id.* at Photo 019. The Board finds that Mr. Vanderheiden violated Section 21(p)(7) of the Act.

Open Burning

The Agency has declined to prosecute the alleged violation of Section 21(p)(3) for open burning. Therefore, the Board dismisses this count. (415 ILCS 5/21(p)(3)(2008)).

Alleged Defense of Site Cleanup

The Board notes that Mr. Vanderheiden raised as a general defense, without citation to authority, that he is in the process of cleaning up the site and has cleaned up some of the items on his property. Tr. at 26-27. The Board responds to this defense by noting that voluntary clean up actions performed by a respondent after a site inspection are generally neither a defense to the violations, nor relevant to determining the civil penalty amount. See IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug 30, 1990. (“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.”).

Civil Penalties and Hearing Costs

Because the Board finds that Mr. Vanderheiden violated Sections 21(p)(1) and (p)(7) of the Act on February 7, 2008, and those violations were not the result of uncontrollable circumstances, the Board now discusses civil penalties and hearing costs. Both are addressed in Section 42(b)(4-5) of the Act (415 ILCS 5/42(b)(4-5).

In an administrative citation action under Section 31.1 of the Act, any person found to have violated any provision of subsection (p) of Section 21 of the Act shall pay a civil penalty of \$1,500 for each such provision, plus any hearing costs incurred by the Board and the Agency, except that the civil penalty amount shall be \$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)(2008).

The Board finds that the violations in the Administrative Citation were Mr. Vanderheiden’s first violations. Thus, the statutory penalty will be \$1,500 for each violation of the Act. The respondent violated Sections 21(p)(1) and (p)(7), therefore his total penalty will be \$3,000.

The Board directs the Agency and the Clerk of the Board to file hearing costs documentation, to which Mr. Vanderheiden may respond within 21 days after service of the claimed costs. 35 Ill. Adm. Code 108.506(a). After the time periods for the filings on hearing costs have run, the Board will issue a final opinion and order imposing civil penalties and assessing appropriate hearing costs.

CONCLUSION

After reviewing the record in this case and the relevant portions of the Act, the Board finds that Mr. Vanderheiden caused or allowed the open dumping of waste resulting in litter and unlawful deposition of construction or demolition debris. Therefore, the Board finds that Mr. Vanderheiden violated Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1) and (p)(7) (2008). The Board dismisses the alleged violation of Section (p)(3) of the Act at the Agency’s request. 415 ILCS 4/21(p)(3). In its final order, the Board will order respondent to pay a civil penalty of \$3,000.00. As set forth below, the Board directs the Clerk and the Agency to document hearing costs and serve them upon respondent, after which the respondent may file a response and the Board will issue a final order. See 35 Ill. Adm. Code 108.504, 108.506.

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

ORDER

1. The Board finds that Hiram Vanderheiden Jr. violated Sections 21(p)(1) and (p)(7) of the Act.
2. The Board dismisses the alleged violation of 21(p)(3) of the Act.
3. The Agency must file a statement of hearing costs within 30 days of this order, on or before May 3, 2010, the first business day after the 30th day of this order. The statement must be supported by affidavit and served upon respondent. 35 Ill. Adm. Code 108.502. Within the same 30-day period, the Clerk of the Illinois Pollution Control Board must also file and serve upon respondent a statement of the Board's hearing costs supported by affidavit. See Ill. Adm. Code 108.504, 108.506(a).
4. Respondent may file any objections to those statements within 21 days of service of those statements, by a date on or about May 24, 2010. 35 Ill. Adm. 108.506(a).
5. The Board will then issue a final order assessing a statutory penalty of \$ 3,000.00 for the violations and awarding appropriate hearing costs. 35 Ill. Adm. Code 108.500(b).

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 April 1, 2010, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board