

ILLINOIS POLLUTION CONTROL BOARD
June 5, 2014

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 12-51
)	(IEPA No. 87-12-AC)
NORTHERN ILLINOIS SERVICE)	(Administrative Citation)
COMPANY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.A. Burke):

The Illinois Environmental Protection Agency (Agency) filed an administrative citation against Northern Illinois Service Company (Northern) alleging open dumping and accumulation of water in used or waste tires. *See* 415 ILCS 5/31.1(c) (2012)¹; 35 Ill. Adm. Code 101.300(b), 108.202(c). The administrative citation concerns Northern’s facility located in Rockford, Winnebago County. Northern filed a petition to contest the administrative citation.

The Agency asks the Board to grant summary judgment finding that Northern violated Sections 21(p)(1), 21(p)(7), and 55(k)(1) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7), 55(k)(1) (2012)). For the reasons below, the Board denies the Agency’s motion for summary judgment, and directs the parties and the hearing officer to proceed expeditiously to hearing.

PROCEDURAL HISTORY

On May 7, 2012, the Agency filed an administrative citation alleging that, on March 14, 2012, Northern violated Sections 21(p)(1), 21(p)(7), and 55(k)(1) of the Act (415 ILCS 5/21(p)(1), (p)(7), 55(k)(1) (2012)) at a facility owned by Northern located at 4781 Sandy Hollow Road, Rockford, Winnebago County (site). The property is known to the Agency as the “Rockford/Northern Illinois Service” site and is designated with Site Code No. 2010301120. The Agency filed proof that it served the administrative citation on May 7, 2012 on Northern. On June 11, 2012, Northern filed a petition for review (Pet.).

On December 31, 2012, the Agency filed a motion for leave to file an amended citation. The Agency sought to amend the citation to correct the amount of civil penalty sought. On January 22, 2013, Northern filed a memorandum opposing the Agency’s motion. On March 21,

¹ The Agency references the 2010 version of the Illinois Environmental Protection Act in its Administrative Citation. For purposes of this order, the Board references the 2012 version of the Act unless a material change in the language of the Act has occurred.

2013, the Board denied the motion for leave to file an amended citation as unnecessary. The parties proceeded with discovery following the Board's order.

On February 18, 2014, the Agency filed its motion for summary judgment (Mot.). Northern responded to the motion on April 7, 2014 (Resp.). The Agency filed its reply on May 3, 2014 (Reply).

AGENCY MOTION FOR SUMMARY JUDGMENT

Open Dumping

The Agency states that, on March 14, 2012, its inspector observed a pile of material on the ground and in the yard area of the site. Mot. at 10. The pile included wood, pipes, plastics, and metals. *Id.* The pile was not protected from the weather, and appeared to have been discarded on the site. *Id.* The Agency notes William Hoff, a Superintendent at Northern's site, testified that the materials "were set out in the back of a truck and into a pile so that we could dispose of them properly." *Id.* The Agency argues, however, that Northern "could not pile waste upon its grounds with the intention of disposing it elsewhere later on" because "neither Northern nor the Site was a sanitary landfill or a waste transfer station permitted to operate by [the Agency] at the time of Inspector Shehane's March 14, 2012 inspection." *Id.*

The Agency contends that the pile included lumber, plastic, and metal, including plastic sheeting and wooden pallets, and that the materials in the pile constituted litter. Mot. at 10. Further, the materials, including concrete chunks or brick, constituted general construction or demolition debris. *Id.* at 11. The Agency notes that Mr. Hoff "identified PVC pipe; plastic silt fence from excavation sites for erosion control; small pieces of concrete chunks or bricks; and wood materials including pallets and dimensional lumber." *Id.* The Agency further notes that Mr. Hoff testified that the pipe and silt fence came from a project site. *Id.* The Agency states that Mr. Hoff described the origins of the material in the pile as "[p]rimarily from our shop and job sites," and that it was possible that some of the materials in the pile had been on the site for at least a month. *Id.*

The Agency concludes that

no genuine issue of material fact exists that Northern caused or allowed the open dumping of waste resulting in litter and the deposition of general construction or demolition debris at the dump site, as the pile observed and documented by Inspector Shehane on March 14, 2012 comprised materials constituting litter and general construction or demolition debris; as the materials were not covered or protected from the weather; as no present or future use for the materials was apparent; as the material appeared to have been discarded and disposed on the Site; and as Hoff testified that the materials were piled on Northern's grounds for subsequent proper disposal but neither Northern nor the Site was permitted at the time as a sanitary landfill or a waste transfer station. Mot. at 11-12.

Accordingly, the Agency seeks summary judgment against Northern for violation of Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), (p)(7) (2012).

Water Accumulation in Used or Waste Tires

The Agency states that its inspector observed four large tires at the southwest corner of Northern's facility. Mot. at 12. The tires were not mounted on a vehicle or wheel rim, appeared worn and damaged, and were not covered or protected from the weather. *Id.* at 12-13. The Agency states that the tires "appeared to have been disposed of on the Site." *Id.* at 13.

The Agency notes that Paul Munson, an Office Manager and Project Manager Estimator at Northern's site, testified that the tires were from Northern's equipment. Mot. at 13. Mr. Hoff had characterized the tires as used and worn tires. *Id.* Mr. Munson further testified that he instructed an employee to pick up the tires, shake them out, stack them back up, and put a cover over them. *Id.* Mr. Hoff testified that the tires were taken to a tire disposal facility. *Id.*

The Agency states that no genuine issue of material fact exists that Northern caused or allowed water to accumulate in used or waste tires

as the tires came from Northern's vehicles; were stacked in Northern's yard; were used, worn, damaged, and not mounted on a vehicle; had no apparent present or future use and appeared to have been disposed of on the Site; were not properly covered or otherwise protected from the weather so as to prevent water accumulation; did, in fact, accumulate water; and subsequently were taken to a tire disposal facility. *Id.* at 14.

Accordingly, the Agency seeks summary judgment against Northern for violation of Section 55(k)(1) of the Act. 415 ILCS 5/55(k)(1) (2012).

NORTHERN RESPONSE TO AGENCY MOTION

Northern objects to summary judgment and argues that the Agency's motion be denied. Northern further argues that various factual issues, as discussed below, preclude summary judgment.

Agency Inspector

Northern contends that summary judgment should be denied based on the Agency inspector's explanation of her background and methodology in inspections. Resp. at 8. Northern notes that the inspector specialized in the tire unit of the Agency at the time of her 2012 inspection, and only started in the construction debris field in 2013. *Id.* at 9. Northern further argues that the inspector "admitted she did not know what the materials in the alleged 'waste pile' were used for" or "when the materials were deposited on the ground." *Id.* The inspector concluded that Northern had broken the law "despite her admission that she thought that Northern would 'dispose of' the waste pile eventually." *Id.* Northern contends that a genuine issue of fact exists given these admissions and without consideration of the specific content of

the landscape materials or debris pile. *Id.* Northern further contends that an issue of fact exists if the inspector “did not know when the materials in question were deposited on the ground nor what they were.” *Id.*

Open Dumping

Northern argues that open dumping did not occur at its site. Resp. at 12. Northern states that the deposition testimony from the witnesses was consistent in that the waste pile was not intended for disposal at Northern’s site, but was to be taken away to a landfill. *Id.* at 13. Landfill receipts were provided to the Agency “demonstrating Northern’s consistent removal of materials to landfills.” *Id.* Northern states that the inspector “admitted that whether there is ‘open dumping’ of waste depended upon whether it was going to be taken away.” *Id.* Mr. Hoff stated that Northern intended to dispose of it at a site other than Northern’s official site. *Id.* Northern contends that summary judgment must be denied

because Northern had a plan and practice of removing material from its site to a landfill[,] . . . because of the scant evidence of the prior use of the materials[,] . . . because [the Agency] has produced no evidence of how long the ‘waste pile’ existed before it was taken away to a landfill[,] . . . [and] because the material was confined or contained to prevent its entry into the environment as shown by the photographs and as testified to by Munson. Resp. at 14.

Northern further contends that the waste pile did not constitute litter. Resp. at 14. Northern argues that the Litter Control Act requires “discarding” and Northern “did not discard the ‘waste pile’ but intended to and did dispose of it at a landfill.” *Id.* Northern also notes that the Litter Control Act provides an exception from the depositing of litter if “the person is the owner . . . and does not create a public health or safety hazard, a public nuisance, or a fire hazard.” *Id.* Northern states there have been no complaints regarding the debris pile on the site, and no insinuation that it created a public health or safety hazard. *Id.* at 15. Northern notes another exception in the Litter Control Act for litter on an owner’s land that cannot be “blown or otherwise carried by the natural elements onto the real property of another person.” *Id.* Northern argues that the photograph of the waste pile and lack of testimony to the contrary reveals that the materials could not be blown onto the real property of another person. *Id.*

Northern contends that the materials are not “general construction or demolition debris” or “clean construction or demolition debris.” Resp. at 16. Northern states evidence and testimony established that the material did not result from construction or demolition. *Id.* at 15. Mr. Hoff testified that demolition materials are never dumped at Northern’s office site. *Id.* Rather, the materials came from

packaging material containing equipment or supplies delivered to Northern either at its office or at construction sites, parts of plastic material which was original material used by Northern in sewer work, bricks, rock or stone which resulted from its recycling operation at its office site, or other equipment such as silt fencing used to prevent environmental harm or plastic visqueen to cover freshly laid concrete at its office site. *Id.* at 15-16.

Northern further states that the “waste pile” is actually composed of “packaging material, equipment, supplies, and recycled material of Northern.” Resp. at 16. Northern operates a recycling operation at the site. *Id.* Materials for recycling as well as materials produced from recycling are stored at the site. *Id.* Northern states that “bricks, concrete, stones, etc. are the materials destined for the recycling or resulting from the recycling.” *Id.* Further, the wooden materials “were packaging pallets upon which Northern’s equipment and supplies arrived.” *Id.* The 12x12 oak was “equipment used in connection with the recycling operation.” *Id.* The plastic visqueen “was used as a tool in covering the cement poured on site.” *Id.* Plastic piping portions “were original equipment of Northern used in its construction work.” *Id.* Lastly, the fencing material “was used as a tool on construction site to prevent other environmental harm.” *Id.* Northern states that “there was no ‘construction debris’ or commonly understood ‘waste’ in the pile” and that none of the material was “destined for final deposit at Northern.” *Id.* Northern also states that the inspector “noted that she has never issued a citation against a business which generated waste at its own site for disposal later elsewhere” and that the materials in question are “equipment, supplies, and packaging for the same generated generally at Northern’s site.” *Id.* at 17.

Northern contends that the definition of “disposal” at 35 Ill. Adm. Code 810.103 has not been met because the Agency “presented no evidence that the ‘waste pile’ did or could contain anything that could be emitted into the air or discharged into the water.” Resp. at 17. Northern also argues that the Agency “has not established that the ‘waste pile’ contained ‘waste.’” *Id.* Northern states that, to the extent an item in the pile could be designated as waste, “such designation would be *de minimis* and not worthy of a citation.” *Id.* at 17-18.

Water Accumulation in Used or Waste Tires

Northern notes the inspector’s testimony that tire storage sites are allowed fourteen days from the generation of a tire or its receipt to control water accumulation. Resp. at 10. Northern states, however, that the Agency issued the citation without evidence that the inspector knew how long the tires had been at Northern’s site. *Id.*

Northern also contends that the inspector “transgressed [the Agency’s] informal rule of warnings before citations by citing Northern for water in tires with no warning given.” Resp. at 10. Further, Northern argues “[t]he small number of tires in evidence and the zero chance of the issue at concern, mosquitos, would make any violation *de minimis* and not worthy of a citation.” *Id.*

Northern contends that the reference to the tires as “used tires” is incorrect. Resp. at 10. Northern states that the tires “were actually Northern’s equipment and used as shock absorbers around hardened equipment used for demolishing structures and concrete slabs.” *Id.* at 11.

AGENCY REPLY TO NORTHERN RESPONSE

Agency Inspector

The Agency states that Northern does not identify any provision of the Act or its regulations that the inspector did not satisfy with her inspection. Reply at 1. The Agency also notes Northern's focus on the inspector's testimony and states that, regardless of the testimony, the Agency

rests its right to summary judgment not upon Inspector Shehane's definitions or discretion in determining whether she observed something meeting those definitions, but instead upon the Act's definitions and the uncontested facts in this action that satisfy the elements of those definitions and of each of the violations alleged. Reply at 2.

Open Dumping

The Agency restates the inspector's observation that the pile of material on the ground at Northern's site was not covered or protected from the weather, did not appear to have any present or future use, and appeared to have been discarded and disposed on the site. Reply at 5. The Agency notes that Mr. Hoff identified in the pile PVC pipe, packing materials, plastic silt fence, small pieces of concrete chunks or bricks, packaging and wood materials, and plastic visqueen. *Id.* at 5-6. Mr. Hoff also testified that the materials in the pile originated "[p]rimarily from our shop and job sites." *Id.* at 6, citing Hoff Dep. at 22. Mr. Hoff further testified that it was possible that some of the materials had been at the site for at least a month, and that the materials "were set out in the back of a truck and into a pile so that we could dispose of them properly." Reply at 6, citing Hoff Dep. at 30-31.

The Agency states that Mr. Hoff and Mr. Munson, after the March 14, 2012 inspection, agreed to clean up some of the broken pallets and pipe that were present on the site. Reply at 6. The Agency further notes that Mr. Hoff testified that packaging material from Northern's shop, packaging material that had been brought from job sites, and scrap pipe brought from job sites, were present on the Northern site. *Id.* The Agency notes Mr. Hoff's testimony that the materials were hauled to a landfill "shortly thereafter." *Id.*, citing Hoff Dep. at 13.

The Agency argues that Northern cannot escape a violation for causing or allowing open dumping just because the material was only temporarily being stored on the site prior to disposal at a landfill. Reply at 7. The Agency notes that, at the time of the March 14, 2012 inspection, "neither Northern nor the Site was a sanitary landfill or a waste transfer station permitted to operate by [the Agency]." *Id.* The Agency argues, therefore, that Northern could not take discarded materials from its shop or job sites and "dump that material in a pile on its site," even temporarily, because it lacked a permit to do so. *Id.*

Water Accumulation in Used or Waste Tires

The Agency does not contest that some of the tires at the site were used as shock absorbers. Reply at 3. The Agency further does not dispute that tires filled with concrete and used as bases for light or power poles do not violate Section 55(k)(1) of the Act. *Id.* However, the Agency's motion is predicated on the "four large, off-rim [tires] that appeared worn and damaged; were not covered or protected from the weather; and that no present or future use for these particular tires was apparent." *Id.* The Agency notes Mr. Hoff's characterization of these tires as used tires not mounted on a vehicle, with some of the tires being damaged. *Id.* at 4. Mr. Hoff further testified that the tires were subsequently taken to a tire disposal facility. *Id.*

The Agency also disputes Northern's use of a fourteen day rule that requires fourteen days to have passed from the time the tires arrived at the site for the facility to cover the tires or otherwise prevent water accumulation. Reply at 4. The Agency notes that Section 55(k)(1) of the Act is a statutory provision enacted August 25, 2009, whereas 35 Ill. Adm. Code 848.202 (containing the fourteen day rule) is a regulation promulgated February 14, 1992. *Id.* The Agency states that, "[a]s a statutory provision and one enacted long after the regulatory provision, Section 55(k)(1) controls over 35 Ill. Adm. Code 848.202." *Id.*, citing 35 Ill. Adm. Code 848.103. The Agency argues that Section 55(k)(1) "provides no 14-day exception" and that the amount of time passed since the tires were received at the site "is irrelevant." *Id.*

BOARD DISCUSSION

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998); see also 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483. Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." *Id.*

As to the alleged violations of Sections 21(p)(1), 21(p)(7) and 55(k)(1) of the Act, the parties dispute various facts in the administrative citation. The Agency drafted its motion for summary judgment to rely heavily on Northern's responses to interrogatories and deposition testimony of two employees. However, considering the record to date against the Agency and in favor of Northern, the Board is persuaded that questions of fact remain, and therefore, denies summary judgment as discussed in more detail below.

Open Dumping

Section 21(p) of the Act provides in part that no person shall

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 . . . ; or
 - (ii) clean construction or demolition debris 415 ILCS 5/21(p) (2012).

To determine whether Northern violated Sections 21(p)(1) and 21(p)(7) of the Act, the Board must first determine if open dumping occurred at the Northern site in violation of Section 21(a). Section 21(a) of the Act provides that “no person shall cause or allow open dumping of any waste.” 415 ILCS 5/21(a) (2012). “Open dumping” is “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 (2012). “Refuse” means “waste,” (415 ILCS 5/3.385 (2012)) and “waste” includes “any garbage . . . or other discarded material.” 415 ILCS 5/3.535 (2012).

A genuine issue of material fact exists as to whether open dumping occurred at the site. Northern disputes whether the materials in the pile depicted in photograph 4 attached to the administrative citation are waste and the origin of the materials, contending that the materials were “equipment, supplies, and packaging for the same generated generally at Northern’s site.” Resp. at 17. Northern contends that the materials were not intended for disposal at the Northern site, and provided receipts to the Agency “demonstrating Northern’s consistent removal of materials to landfills.” *Id.* at 12-13. Northern further argues that the items were neither litter nor construction and demolition debris. Resp. at 14, 16. Northern contends that the items had not been discarded, and that the items did not result from construction or demolition. *Id.* at 14, 15.

Water Accumulation in Used or Waste Tires

Section 55(k)(1) of the Act states in part that no person shall “cause or allow water to accumulate in used or waste tires.” 415 ILCS 5/55(k)(1) (2012). This prohibition “shall not apply to used or waste tires located at a residential household, so long as not more than 12 used or waste tires are located at the site.” *Id.*

A genuine issue of material fact exists as to whether Northern has caused or allowed water to accumulate in used or waste tires. Northern contends that the tires “were actually Northern’s equipment and used as shock absorbers around hardened equipment used for demolishing structures and concrete slabs.” Resp. at 11. The Agency does not contest that some of the tires at the site were used as shock absorbers. Reply at 3. However, Northern specifically states that the tires that are the subject of the Agency’s motion (photographs 1 and 2 attached to the administrative citation) are from Northern’s equipment, and that the tires are used as bases to be filled with concrete for temporary light poles or power poles. Munson Dep. at 37 (attached as Exhibit C to Motion); Hoff Affidavit (attached as Exhibit A to Response) at 2. Northern also contends that the tires were kept as replacement tires in the event of a flat. Hoff Affidavit at 2. Lastly, the origin of the tires is not clear from the record.

CONCLUSION

The Board denies the Agency's motion for summary judgment. The Board directs the parties and the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 5, 2014, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board