

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Complainant,

v.

JAMES HARRIS,  
Respondent.

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AC 13-60

(IEPA No. 126-13-AC)

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OCT 23 2014

STATE OF ILLINOIS  
Pollution Control Board



**ORIGINAL**

**NOTICE OF FILING**

To: Michelle M. Ryan  
Special Ass't Attorney General  
Illinois Environmental  
Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that on this date I deposited in the United States mail for filing with the Clerk of the Pollution Control Board of the State of Illinois the following instrument(s) entitled Respondent's Post-hearing Brief.

Respectfully Submitted,

Mark V. Kelly  
Attorney for James Harris

Dated: October 20, 2014

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**RESPONDENT'S POST-HEARING BRIEF**

The Illinois Environmental Protection Agency ("Illinois EPA") has not proven by admissible evidence the allegations of its administrative citation issued to Respondent James Harris ("Harris") on June 28, 2013, because its evidence was gathered in violation of Harris' rights under the Fourth Amendment to the Constitution of the United States, because circumstances were proved which show violations should not be found, and because Harris demonstrated uncontrollable circumstances led to his conduct.

As conceded in the Complaint's brief, Respondent has owned the site in Knoxville, Illinois, on which the violations are alleged, since 1975 (Tr. at 50) and continues to operate a business there (Tr. at 67). The Fourth Amendment to the Constitution of the United States reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (*Illinois Compiled Statutes*, page 6, 2012 State Bar Edition) "Outdoor commercial premises, like the interior of commercial buildings, are protected from unreasonable searches under the fourth amendment." *People v. Janis*, 565 N.E.2d 633, 640, 139 Ill.2d 300, 152 Ill.Dec. 100 (Ill., 1990).

Harris had a legitimate expectation of privacy in his premises. It is located at the dead end of a street where it approaches a creek (Tr. at 7-8, Exhibit 1), has extensive vegetation present (Tr. At 36), a fence along the north side, and there is a pole building present (Tr. at 9). He stored items there to use for his rental properties (Tr. at 64). Harris' expectation was reasonable by society's standards. Harris has suffered thefts there before and reported them to law enforcement and sought restitution (Tr. at 65). *See, People v. Janis*, 565 N.E.2d 633, 640, 139 Ill.2d 300, 152 Ill.Dec. 100 (Ill., 1990) (Relevant factors to consider in determining whether search infringes upon personal and societal values include “the uses to which the area has been put and society's understanding that certain areas deserve particular protection from governmental intrusion.”).

Harris' failure to object to the search is due to his not being asked. The inspector acknowledge the possibility a property owner could object to an EPA search, that it had happened to him once before, and that he then obtained a warrant (Tr. at 41, 43). *See, Tippin v. Rockdale Sash & Trim Co., Inc.*, 553 N.E.2d 729, 196 Ill.App.3d 333, 143 Ill.Dec. 22 (Ill.App. 3 Dist., 1990)(defendant contested “the issuance of an administrative inspection warrant pursuant to Section 4(d) of the Illinois Environmental Protection Act.) Despite the claim that it was difficult to locate Harris (Tr. at 29), the inspector's attempt to do so was minimal (Tr. at 34). Harris has been in business as “Harris Trucking” for over 40 years (Tr. at 49). The inspector had discussed Harris with employees of the Knox County Landfill (Tr. at 26). It is clear the inspector made no real effort to contact Harris.

Without the illegal search, the state could have obtain no evidence. There was no evidence establishing that any of the violations were visible from public property, although the inspector at one point speculated “maybe” some could have (Tr. at 45). All the photographs were taken from inside the Harris property (Tr. at 45). The inspector testified it was difficult to determine the origin of items scattered throughout the vegetation (Tr. at 16). The vegetation on the premises was significant. The inspector

first stated that at the time of his inspection the “trees are just starting to bud” (Tr. at 36), but when presented with one of his photographs, he conceded that the trees were “leafing out” (Tr. at 37). His opinion that the level of “leafing out” was “approximately fifty percent” (Tr. at 37) does not establish that the items were visible as violations from outside the premises.

Alternatively, if sufficient evidence of violations is found, Harris argues his activity caused no injury to the public, and involved the periodic removal of items from the property and transport to landfills, which allowed him to continue to stay in business. The activity was conducted in a relatively secluded location at the dead end of a street in a rural area with significant vegetation. In addition, the duress caused by Knox County unlawfully denying him in the use of the landfill, which circumstance he could not control, excuses his conduct.

Harris should not be sanctioned for the temporary use he made of his property. He has operated a hauling business for over 40 years (Tr. at 50), that also involves submitting items for recycling or sale (Tr. at 56-57, 63). He also stores at the property items he uses for rental properties he owns (Tr. at 64-66). Harris currently disposes of waste items at two landfills (Tr. at 58). One of them charges by volume, and Harris conceded he burned items, in containers, at the Knoxville property to reduce the volume to reduce the landfill cost (Tr. at 63). Harris testified the costs of using these landfills would not generally allow him to make a living and he had in fact lost customers (Tr. at 64). However, no evidence was presented showing actual harm to the public as a result of Harris' activity on the Knoxville property. Harris had conceded violations regarding his property in the past (Tr. at 66) but had cleaned up the property (Tr. at 73). He thereafter took steps he thought addressed the past conceded violations, namely, burning items on the open ground instead of in containers (Tr. at 66).

Harris maintains Knox County, and particularly, the operators of the landfill, forced him to use his property as he did (Tr. at 66). The landfill operators imposed an

illegal charge on Harris, under unjust circumstances, which Harris refused to pay (Tr. at 51, 56). When Harris next went to the landfill, he believed he had the “green light” to proceed and did so, but the landfill administrator decided to stop Harris and did so by causing Harris to collide with his truck (Tr. at 54, 57). The landfill supervisor then barred Harris from the landfill (Tr. at 57-58, Exhibit 1 (letter dated January 31, 2011)). Harris was charged with felonies as a result of the incident, but was acquitted of them (Tr. at 57). The Knox County Board thereafter also permanently banned Harris from using the landfill (also insisted he pay the unlawful “double fee” and for damage to the county truck) (Tr. at 58, Exhibit 1 (letter dated September 9, 2011)). Harris did pay the actual, regular tipping fee (Tr. at 69-70).

Prior to 2011, Knox County purported to authorize the landfill operators to charge twice the established “tipping fee” to drivers allegedly coming to the landfill with “unsecured loads” (Tr. at 52-53), Exhibit 1 (“Board Letter”). There appears to be no actual ordinance in this regard (Tr. at 52-53). The county had no authority to allow the landfill operators to impose fines for the alleged improper use of the highways approaching the landfill (*See*, 625 ILCS 5/15-109 (prohibiting vehicles on highways from allowing loads to escape therefrom, and making a violation a petty offense) *and* 55 ILCS 5/5-1047 (county may operate landfills and “charge a reasonable fee on the basis of weight”)).

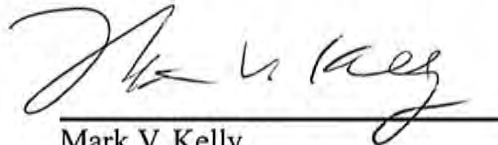
Even if the landfill did have authority to double the tipping fee, it did so against Harris in an arbitrary manner, telling him he was in violation of the rule only *after* allowing him to deposit his truckload of waste into the landfill (Tr. at 51, 56). Harris attempted to resolve the matter through the Knox County State's Attorney's office but was unsuccessful (Tr. at 56). While attempting this, Harris focused on recycling so as to not need the landfill, but found eventually he had to use it (Tr. at 56-57). But he was then formally, permanently barred (Tr. at 57-58, Exhibit 1 (letters dated January 28, 2011 and September 9, 2011)).

Harris was thus subject to arbitrary and capricious state action, and in violation of his constitutional right to due process. This constitutes an uncontrollable circumstance. There is nothing short of litigation Harris may do to restore his right to use the Knox County landfill. State action can constitute an uncontrollable circumstance excusing a party's conduct. *See, e.g., Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-992 (5th Cir.1976). Harris could not have foreseen the county's conduct and his business was made economically unviable, because of it, without Harris using his property as he did (Tr. at 64). *See, Smith v. Roberts*, 370 N.E.2d 271, 273-274, 54 Ill.App.3d 910, 12 Ill.Dec. 648 (Ill. App. 4 Dist., 1977).

Because the Illinois EPA photographs, inspection report, and hearing testimony all flowed only from an unconstitutional search of Mr. Harris' property, and were not shown to have been available in any other way, the state has not proven he violated the Act. If a violation is shown, Mr. Harris has shown the circumstances of his case do not warrant the finding of violations of the Act, and the unlawful conduct of the operators of the Knox County landfill created duress upon him excusing his conduct. For these reasons he requests the Board enter a final order finding no violations occurred and imposing no penalties.

Respectfully Submitted,

Dated: October 20, 2014

  
Mark V. Kelly  
Attorney for James Harris



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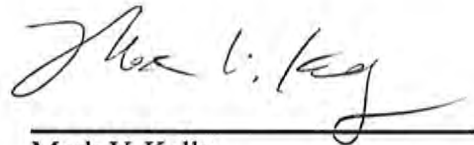
I hereby certify that I did on the 20<sup>th</sup> day of October, 2014, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument(s) entitled Respondent's Post-hearing Brief.

To: Michelle M. Ryan  
Special Ass't Attorney General  
Illinois Environmental  
Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

And

To: John Therriault, Clerk  
Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Dated: October 20, 2014



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