

ILLINOIS POLLUTION CONTROL BOARD
December 4, 2014

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 13-60
)	(IEPA No. 126-13-AC)
JAMES HARRIS,)	(Administrative Citation)
)	
Respondent.)	

MICHELLE M. RYAN APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

MARK V. KELLY APPEARED ON BEHALF OF THE RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On June 28, 2013, the Illinois Environmental Protection Agency (Agency) filed an administrative citation (AC) alleging that James Harris (Harris) caused or allowed open dumping of waste resulting in: litter; open burning; deposition of waste in standing or flowing waters; and deposition of construction or demolition debris. The violations allegedly occurred at Harris' property, known to the Agency as Harris Property or Site, which is located at the end of Market Street at Haw Creek, in Knoxville, Knox County. Today the Board finds that Harris violated Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7) of the Environmental Protection Act ("Act") (415 ILCS 5/21(p)(1), (3), (4), (7) (2012)).

In this interim opinion and order, the Board first describes the AC process, the procedural history, and the facts of this case. The Board then sets forth the pertinent provisions of the Act and summarizes the arguments of the parties as proffered at hearing and in post-hearing briefs. Next, the Board analyzes the issues and makes its conclusions of law regarding the alleged violations, before addressing the issue of penalties. Finally, the Board directs the Agency and the Clerk of the Board to provide hearing costs documentation, to which Harris 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.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the Agency and units of local government to enforce specified provisions of the Act through an AC. 415 ILCS 5/31.1 (2012). The Agency or delegated authority must serve the AC on a respondent within "60 days after the date of the observed violation," (415 ILCS 5/31.1(b) (2012)) and must file a copy of the AC with the Board no later than ten days after serving the respondent. 415 ILCS 5/31.1(c) (2012). To contest the

AC, a respondent must file a petition with the Board no later than 35 days after being served with the AC. *See* 415 ILCS 31.1(d)(2) (2012)); 35 Ill. Adm. Code 108.204(b), 108.406.

If a respondent timely contests the AC, 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. 415 ILCS 5/42(4), (4-5) (2012). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed, (e.g. 415 ILCS 5/42(b)(1-3)), Section 42 of the Act sets specific penalties for administrative citations. 415 ILCS 5/42(4), (4-5) (2012). 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 [AC] 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) (2012).

PROCEDURAL HISTORY

On June 28, 2013, the Agency timely filed an AC with the Board and also provided proof of proper service on Harris. Harris filed a timely petition for review to contest the AC with the Board on August 5, 2013. The Board accepted Harris’ petition for review on September 5, 2013, and directed the hearing officer to set a hearing date.

On August 27, 2014, Board Hearing Officer Carol Webb conducted a hearing (Tr.) at the Galesburg City Hall in Knox County. Agency Attorney Michelle Ryan appeared on behalf of the Agency. Tr. at 4. Attorney Mark V. Kelly appeared on behalf of Harris. *Id.* Agency Field inspector Gene Figge testified at the hearing along with Mr. Harris. (Tr. at 6, 48, 73.) Hearing Officer Webb admitted the Agency inspection report as Agency Exhibit 1 and a packet of photographs as Respondent’s Exhibit 1 into evidence. Tr. at 21, 72. On September 23, 2014, the Agency filed a post-hearing brief (Comp. Br.), and on October 25, 2014, Harris filed a post-hearing response brief (Resp. Br.).

SUMMARY OF AGENCY TESTIMONY

On May 7, 2013, Agency Field Inspector Gene Figge inspected the Site. AC at 1; Ins. Rep. at 1.¹ Figge performed the inspection as a follow-up to previous inspections, most recently one conducted on October 6, 2011. Ins. Rep. at 4. During the inspection, Figge documented approximately 200 cubic yards of materials at the Site, including various items at the entrance of the property, general refuse, the remnants of white goods, what Figge described as “construction and demolition debris,” materials deposited in water, and evidence of open burning. *Id.* at 1, 4, 10-18; photos 1-17.

At hearing, Figge testified that he saw evidence of open burning at a number of locations at the Site. Tr. at 9-12. Figge testified, for example, that the photographs that accompany his

¹ The Agency’s initial filing in this matter is in two parts: the citation; and Figge’s inspection report including the Open Dump Inspection Checklist. The Board will cite to the citation as AC at __ and the inspection report as Ins. Rep. at __ for purposes of this opinion and order. Photographs included in Figge’s inspection report will be referred to by number, where possible.

inspection report depict an accumulation of bricks and other material that appeared to have been open burned. *Id.* at 11. Couches and furniture scattered throughout the property had also been burnt amongst that material. *Id.* at 10. Wire containers filled with ashes and metal debris remained as evidence of the open burning. *Id.* at 10-11. Among the bricks and demolition debris, air conditioning units and white goods were covered with ashes that indicated open burning. *Id.* at 11. Near the wire containers, Figge identified pieces of bed springs that had other material burned off of them. *Id.* at 12, 20.

Figge also discovered a fan, a motor, and casings that indicated remnants of white goods present on the property. Tr. 13-16. One casing appeared to be that of a freezer, which was stuffed with furniture that showed signs of having been open burned. *Id.* The casing was rusted and charred. *Id.* at 13-16, 19. A sink, stove, blue tarp, and lumber, for example, were depicted in the photographs of the property. *Id.* Scraps of charred wood and blackened plastic appeared to have been open burned. *Id.* Moreover, pieces of glass mixed with concrete, brick, and pipes were deposited into Haw Creek, an adjacent waterway. *Id.* at 17-19.

SUMMARY OF RESPONDENT'S TESTIMONY

At hearing, Harris testified to operating an automobile salvage business for around forty-seven years at the Site. Tr. at 50. Harris testified:

what I'm doing with my Knoxville property was I would save things that I can recycle and sell. I noticed every time they mentioned burning, it was open burning, so I think anybody burning in a burning barrel or anything is still open burning. I had these in containers that I was trying to control, and then I would -- when you go up to Coal Valley, they just charge you by the yardage so I could have a heavy load going to Coal Valley and my price would be the same. So I had to reduce the volume because if the volume was greater, that's the way they would charge you. Tr. at 63.

Harris testified that he was unable to avoid violating the Act because he was prohibited from using the Knox County Landfill until his past due fines at that facility were paid. Tr. at 56-66. Harris further testified that it would cost him \$100 to transport the wastes to Kickapoo or Coal Valley. *Id.*

Harris also testified regarding the way the waste was distributed on the Site. Tr. at 58-59, 67. Harris testified that he scattered the debris through the vegetation and that it was difficult to determine their exact origins. Tr. at 65. Harris concealed items through the weeds so as to discourage theft. *Id.* Harris admitted a packet of photographs and maps of the property as Respondent's Exhibit 1.

STATUTORY BACKGROUND

Section 3.305 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 5/3.305 (2012).

Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2012).

Section 3.535 of the Act defines “waste,” in part, 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 or 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 (2012).

Section 3.300 of the Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2012).

The Act does not define “litter,” but in similar cases, the Board has looked to the definition of “litter” in the Litter Control Act, which provides, in part:

“Litter” means 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 of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS105/3(a) (2012); *see County of St. Clair. v. Louis Mund*, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991).

Section 3.160 of the Act (415 ILCS 5/3.160(a)(b) (2012)) defines “construction or demolition debris,” in part, as:

“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 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) (2012).

“Clean construction or demolition debris” means uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities. 415 ILCS 5/3.160(b) (2012).

Section 4(d) of the Act states that “[i]n accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:

- (1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/4(d) (2012).

Section 21(a) of the Act states that “[n]o person shall [c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a) (2012).

Section 21(p) of the Act states that no person shall, “[i]n 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 burning;
- 4) deposition of waste in standing or flowing waters;
* * *
- 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(b) of this Act. 415 ILCS 5/21(p)(1), (3), (7) (2012).

Section 21(p) of the Act provides that the prohibitions specified in this subsection (p) shall be enforceable by the Agency . . . by administrative citation under Section 31.1 of this Act.” 415 ILCS 5/21(p) (2012).

COMPLAINANT’S BRIEF

The Agency argues that open dumping of waste has occurred at the Site, resulting in litter, open burning, and deposition of construction or demolition debris in violation of Section 21(p)(1), 21(p)(3), and 21(p)(7) of the Act.² 415 ILCS 5/21(p)(1), (3), (7) (2012). In its post-hearing brief, the Agency first defines open dumping and argues that the material found on the Site satisfies that definition. Next, the Agency argues that such open dumping resulted in litter,

² The Agency did not argue Section 21(p)(4) of the Act in its post-hearing brief.

open burning, and deposition of construction and demolition debris at the Site. The Agency then addresses the various defenses asserted by Harris, which include, the lack of evidence; evidence obtained in violation of his constitutional rights; and uncontrollable circumstances.

Open Dumping of Waste Resulting in Litter and Open Burning

The Agency argues that it has demonstrated the occurrence of open dumping. Comp. Br. at 2-3, citing 415 ILCS 5/3.305 (2012). First, the Agency states that Harris “has owned the Site since 1975,” and that Harris “continues to operate a business there,” as evidence that Harris has control of the property. *Id.* at 3, citing Tr. at 50, 67. The Agency then describes materials found at the Site (*e.g.*, furniture, white goods, plastics, metals, bricks, concrete, lumber and a pallet, containers, and glass) and argues that the photographs in the record provide evidence that the “discarded material” at the Site is “waste.” *Id.* at 2-3.

The Agency next argues that Harris’ open dumping of waste resulted in litter, violating Section 21(p)(1) of the Act. Comp. Br. at 3. The Agency states that the materials at the Site constitute litter as determined by previous Board decisions. *Id.* at 3. The Agency also argues that Harris’ open dumping of waste resulted in open burning in violation of Section 21(p)(3) of the Act. The Agency points to the testimony of Field Inspector Figge at hearing and his photographs of the Site as evidence of open burning of “waste in the wire and metal containers and on the ground at the Site included metal, furniture, lumber that was partially burned and charred, and ashes, as evident from the photos.” *Id.* at 3. The Agency asserts that Harris admitted at hearing that he needed to reduce the waste in volume in order to pay lower tipping fees at the landfill. *Id.*

The Agency argues that Harris’ open dumping of wastes also resulted in the deposition of construction or demolition debris in violation of Section 21(p)(7) of the Act. Comp. Br. at 4; 415 ILCS 5/21(p)(7) (2012). The Agency points to evidence introduced at hearing that showed bricks, concrete, wood, glass, plastics, and piping present throughout the Site. *Id.* at 4.

The Agency’s Response to Respondent’s Defense Claims

The Agency then discusses Harris’ claim of lack of evidence. The Agency asserts that the above discussion demonstrates that sufficient evidence was presented to support the violations cited. Comp. Br. at 4. The Agency also argues that evidence was not obtained by trespassing because Field Inspector Figge testified that inspections have been conducted at this Site for thirty years, and there was no indication in the file or at the Site that Harris had denied the Agency access to this property. *Id.*, citing Tr. at 47. The Agency states that Field Inspector Figge had never spoken to Harris to obtain express permission to enter because the inspector did not have his contact information. Comp. Br. at 4-5.

Finally, the Agency argues that Harris made a business decision to refuse to pay Knox County because he did not agree that his fee was properly doubled and, therefore, cannot claim that uncontrollable circumstances prevented him from using their services. Comp. Br. at 5. The Agency then argues that Harris’ intent for materials at the Site does not influence the determination of whether a material at the Site is waste or litter under the Act. *Id.* The Agency

states that Harris “was explicitly made aware of these problems at the site two years prior, when on October 7, 2011, the Board issued a final order in AC 11-27, finding Respondent in violation of six subsections of 415 ILCS 5/21(p), including (p)(1), (p)(3), and (p)(7).” *Id.*; 415 ILCS 5/21(p)(1), 3), (7); *see IEPA v. James Harris*, AC 11-27 (Oct. 7, 2011).

RESPONDENT’S BRIEF

On October 23, 2014, after filing a request for an extension of time for filing, Harris filed a post-hearing brief. In his brief, Harris argues that (1) the evidence was gathered in violation of Harris’ rights under the Fourth Amendment to the Constitution of the United States; (2) circumstances were proved that show violations should not be found; and (3) Harris demonstrated uncontrollable circumstances. Resp. Br. at 2.

Evidence Was Gathered in Violation of the Respondent’s Rights

Harris states that the Fourth Amendment to the Constitution of the United States protects “[t]he 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.” Resp. Br. at 2 (internal citation omitted). Harris argues that he has a legitimate expectation of privacy in his premise and that expectation was reasonable because “[o]utdoor commercial premises, like the interior of commercial buildings, are protected from unreasonable searches under the fourth amendment.” *Id.* at 2 (internal citation omitted).

Harris also argues that his failure to object to the search is due to his not being asked. Resp. Br. at 3. Harris states Field Inspector Figge admitted that a property owner could object to a search. *Id.* Field Inspector Figge also recognized, according to Harris, that a property owner had objected to an inspection before, and that the Agency then obtained a warrant. *Id.* Harris argues that Field Inspector Figge made no real effort to contact Harris. *Id.*

Circumstances were proved to Show Violations should not be found

Harris argues that, without the illegal search, the Agency would have obtained no evidence. Resp. Br. at 3. Harris claims that the vegetation on the premise was significant and “the inspector testified it was difficult to determine the origin of items scattered throughout the vegetation.” *Id.* Harris argues that there was no evidence establishing that any of the violations were visible from public property. *Id.*

Harris then argues that, if sufficient evidence is found, Harris caused no injury to the public. Resp. Br. at 4. Harris claims that he periodically removed items from the property and transported them to landfills. *Id.* Harris states that this allowed him to continue to stay in business. *Id.* Harris claims he should not be sanctioned for the temporary use he made of his property because he took steps to address the past conceded violations, specifically, burning items on the open ground instead of in containers. *Id.*

The Respondent Demonstrated Uncontrollable Circumstances Led to his Conduct

Harris argues that Knox County and the operators of the landfill forced him to use his property as he did. Resp. Br. at 4. Harris states that the landfill operators enforced an illegal charge on Harris. *Id.* at 4-5. Harris argues that he refused to pay because the circumstances were unjust. *Id.* at 5.

Harris then argues that if the landfill did have the authority to double the tipping fee, it did so against Harris in an arbitrary manner. Resp. Br. at 5. Harris claims that the landfill operators informed Harris he was in violation of the rule only after allowing Harris to deposit his truckload of waste into the landfill. *Id.* Harris states that he tried to resolve the matter through the Knox County State's Attorney's Office. *Id.* Harris argues he was "subject to arbitrary and capricious state action . . . in violation of his constitutional right to due process." *Id.* at 6. Harris concludes that he "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." *Id.*

DISCUSSION

The Agency alleges that Harris violated Section 21(p)(1), 21(p)(3), and 21(p)(7) of the Act (415 ILCS 5/21(p)(1), (3) (7) (2012)), by causing or allowing open dumping of waste resulting in litter, open burning, and deposition of construction or demolition debris. AC at 2. Harris' purported defenses to the alleged violation are that the violations occurred as a result of uncontrollable circumstances and that the evidence was gathered in violation of Harris' rights under the Fourth Amendment to the Constitution of the United States. Resp. Br. at 2, 4-6.

As a threshold matter, to prove a violation of any subsection of Section 21(p) of the Act, it must first be proved that Harris violated Section 21(a) of the Act by causing or allowing the open dumping of any waste. 415 ILCS 5/21(a) (2012). Section 21(a) provides that "[n]o person shall: (a) Cause or allow the open dumping of any waste." *Id.* Harris argues that he caused no injury to the public, periodically removed items from the property and transported items to landfills, and that therefore, the materials were not waste. Tr. at 64-65; Resp. Br. at 4. However, the Board finds that Harris' use of the materials is not dispositive of whether the materials were waste or litter. See Sangamon County v. Everett Daily, AC 01-16, 01-17 (cons.), 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, No. 4-02-0139 (4th Dist. Sept. 18, 2003) (unpublished).

"Waste" is defined as "any garbage . . . or other discarded material." 415 ILCS 5/3.535 (2012). Figge's testimony and photographs establish that the Site contained substantial amounts of discarded materials. Specifically, the photographs show bricks, concrete, wire containers holding burned material, couches or other furniture that appeared to be partially burned, air conditioning units, bed springs which had the other waste material burned off of them, a fan and some casings that appear to be remnants of white goods, and other general refuse. See *supra* at 2-3; Tr. at 10-20. The Board finds that, under these factual circumstances, the materials were "discarded" and therefore constitute "waste" under the Act. The Board further finds that the Site

is not a permitted landfill, and, therefore, the discarded waste at the Site resulted in open dumping.

As noted above, the Board has adopted the definition of “litter” provided in the Litter Control Act for purposes of Section 21 of the Act. *See County of St. Clair*, AC 90-64, slip op. at 4, 6. Consistent with the discussion above, the Board finds that the discarded material on Harris’ property falls within the definition of “litter.” Thus, the Board finds that Harris’ open dumping of waste resulted in litter in violation of Section 21(p)(1) of the Act. 415 ILCS 5/21(p)(1) (2012).

Having established that the open dumping of waste resulted in litter, the Board next considers whether the waste was open burned. “Open burning” is defined by statute as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2012). Figge observed waste in the wire and metal containers and on the ground at the Site including metal, furniture, lumber that was partially burned and charred, and ashes. Tr. at 10-15. Couches and furniture scattered throughout the property had also been burned. *Id.* Containers filled with ashes and metal debris had remained as evidence of the open burning. *Id.* Among the bricks and demolition debris, air conditioning units and white goods were covered with ashes that indicated open burning. *Id.* Finally, Harris admitted at hearing that he needed to reduce the debris in volume in order to pay lower tipping fees at the landfill, and that he did this by burning at the Site. Tr. at 63. The Board finds that by burning materials that had been open dumped at the Site in order to reduce the volume, Harris violated Section 21(p)(3) of the Act. 415 ILCS 5/21(p)(3) (2012).

Furthermore, the Act defines “construction or demolition debris” to include wood, metal, bricks and rock materials. *See* 415 ILCS 5/3.160(a) (2012). These items, among others meeting the definition of “construction or demolition debris,” were all found on Harris’ property. For example, Figge described his photographs as depicting general refuse, such as a sink, stove, blue tarp, and lumber demolition debris, from the demolition of houses, on the property. Tr. at 10-17. Figge also testified that pieces of glass mixed with concrete, brick, and pipes were deposited in Haw Creek. *Id.* at 17-19. The Board finds that Harris’ open dumping of waste resulted in the deposition of construction or demolition debris.

One statutory defense to an administrative citation is that the violations were the result of uncontrollable circumstances (*see e.g., IEPA v. John Groff*, AC 05-20, slip op. at 1-2 (Oct. 20, 2005)). The only other defense is that the violations did not occur (*see IEPA v. Omer Thomas*, AC 89-215 (Jan. 23, 1992). In *Thomas*, the Board stated:

Pursuant to Section 31.1(d)(2) of the Act, if the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty. Respondent has two defenses to an administrative citation. The first is to show that the violation did not occur; the second that it occurred but was due to uncontrollable circumstances. [415 ILCS 5/31.1(d)(2)]. *Thomas*, AC 89-215, slip op. at 2 (Jan. 23, 1992).

The Board has consistently held that, absent one of these two defenses, a violation must be found. *See, e.g., IEPA v. Frank Bencie*, AC 04-77 (Feb. 16, 2006); *see also* 35 Ill. Adm. Code 108.206.

The Board does not find Harris' argument that the violations are the result of uncontrollable circumstances persuasive. The record illustrates that Harris had control of the property and the waste at the Site. Harris made a decision to refuse to pay Knox County because he did not agree that his fee was properly doubled. Tr. at 63-66. Moreover, Harris testified that he scattered the debris through the vegetation so as to keep the items difficult for looters to see and take. *Id.* According to his testimony, Harris had been saving the debris in order to recycle and sell it. Harris also testified that he had been trying to control the items from open burning by placing the materials into containers. *Id.* A review of the record definitively establishes that the violations did occur and that Harris had control of the Site and materials deposited at the Site. The Board notes that even if a finding was made that Harris was barred from the local landfill, the record remains clear that Harris retained control of his property along with the waste disposed of on the Site.

The Board finds Harris' claim that evidence was gathered in violation of Harris' rights under the Fourth Amendment to the Constitution of the United States unavailing. Section 108.202 of the Board's procedural rules states: "in accordance with Section 31.1 of the Act, the Agency . . . may serve an AC upon any person [] believed, through direct observation, to have violated subsection (o) or (p) of Section 21 of the Act." 35 Ill. Adm. Code 108.202(a). Section 4(d) of the Act also states: "in accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property." 415 ILCS 5/4(d) (2012).

Harris has the burden of showing that the Agency's inspection was unreasonable. *See Miller v. Pollution Control Board*, 267 Ill. App. 3d 160, 169, 642 N.E.2d 475, 483 (4th Dist. 1994). As discussed above, the Board found Harris in violation of Sections 21(p)(1), 21(p)(3), 21(p)(4), 21(p)(5), 21(p)(7), and 55(k)(1) of the Act in AC 11-27 at this Site. *See IEPA v. James Harris*, AC 11-27 (Oct. 7, 2011). In the present case, the Agency's inspector testified that there was no indication in the file or at the Site that Harris had denied the Agency access to the Site. Tr. at 47. The Board finds that Harris did not meet the burden of showing that the Agency exceeded its statutory inspection authority under Section 4(d) of the Act with the May 7, 2013 inspection.

The Board finds that Harris caused or allowed the open dumping of waste resulting in litter, open burning, and deposition of construction or demolition debris. Further, the Board finds that Harris did not establish that the violations were the result of uncontrollable circumstances. Therefore, the Board finds that Harris violated Section 21(p)(1), 21(p)(3), and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), (3), (7) (2012).

The AC also alleges a violation of Section 21(p)(4) of the Act. AC at 2; 415 ILCS 5/21(p)(4) (2012). Section 21(p)(4) of the Act prohibits open dumping that results in the "deposition of waste in standing or flowing waters." 415 ILCS 5/21(p)(4) (2012). The Board finds adequate support in the record to find a violation of Section 21(p)(4) of the Act. The Open Dump Inspection Checklist includes Figge's observation that "general construction and demolition debris had been deposited in the back waters of Haw Creek." Ins. Rep. at 4. Figge's

photographs also depict large sections of brick and debris along the edge of and in water. *Id.* at 16. At hearing, Figge testified, while referencing his photographs, that “you can see general construction and demolition debris which has been deposited in the backwaters . . . you can actually see partially through the water and see some of the debris.” Tr. at 17. Harris offered no testimony at hearing specifically regarding materials or waste in Haw Creek. Neither party made arguments regarding Section 21(p)(4) in post-hearing briefs. The Board, however, has found that Harris open dumped waste in the discussion above. The Board likewise finds ample support in the record for a finding that Harris violated Section 21(p)(4) of the Act by open dumping waste in a manner that resulted in deposition of waste in standing or flowing waters. 415 ILCS 5/21(p)(4) (2012).

Civil Penalty and Hearing Costs

The Agency seeks the statutory \$3,000 civil penalty for each alleged violation that was a second or subsequent violation, for a total of \$12,000. AC at 3. Because the Board finds that Harris violated Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7) of the Act, the Board now addresses the issue of 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 County, except that the civil penalty 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) (2012).

In this case, the Board finds Harris violated Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7) of the Act. As discussed above, the Board made a similar finding against Harris in IEPA v. James Harris, AC 11-27 (Oct. 7, 2011). Therefore, this is Harris’ second or subsequent adjudicated violation of Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7). 415 ILCS 5/21(p)(1), (3), (4), (7) (2012). Therefore, the civil penalty is statutorily set at \$3,000 for each violation of Section 21(p) of the Act. *See* 415 ILCS 5/42(b)(4-5) (2012); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the \$12,000 penalty in its final opinion and order.

In addition, by unsuccessfully contesting the AC at hearing, Harris must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2012); 35 Ill. Adm. Code 108.500(b)(3). The Agency and the Clerk of the Board are each directed to file a statement of costs, supported by affidavit, and to serve the filing on Harris. Harris will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that Harris violated Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7) of the Act (415 ILCS 5/21(p)(1), (3), (4), (7) (2012)) by causing or allowing open dumping of waste resulting in litter, open burning, deposition of waste in standing or flowing waters, and deposition of construction or demolition debris. Harris must pay a civil penalty of \$12,000 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 costs documentation, to which Harris 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 Harris and assessing against him any appropriate hearing costs.

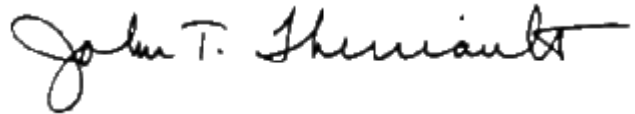
This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that Respondent James Harris violated Sections 21(p)(1), 21(p)(3), 21(p)(4), and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), (3), (4), (7) (2012).
2. By January 5, 2015, which is the first business day after the 30th day of this order, the Agency and Clerk of the Board must each file a statement of hearing costs, supported by affidavit, with service on Harris. See 35 Ill. Adm. Code 108.502; 108.504.
3. Respondent James Harris may file a response with the Board to the filings required by this order, within 21 days of service of the Agency and Board affidavit, with service on the Agency and the Board. 35 Ill. Adm. Code 108.506(a).
4. The Board will then issue a final order assessing a statutory penalty of \$12,000 for the violations and awarding appropriate hearing costs to the Agency and the Board. 35 Ill. Adm. Code 108.500(b).

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 4, 2014, by a vote of 4 to 0.



John T. Therriault, Clerk
Illinois Pollution Control Board