

ILLINOIS POLLUTION CONTROL BOARD
January 10, 2002

COUNTY OF SANGAMON,)
)
Complainant,)
)
v.) AC 01-16
) (SCDPH 00-AC-1)
EVERETT DAILY,) AC 01-17
) (SCDPH 00-AC-2)
Respondent.) (Administrative Citation)
) (Consolidated)

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

On November 16, 2000, pursuant to Section 31.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/31.1(b) (2000)), the County of Sangamon (County) issued the above-captioned administrative citations to Everett Daily (Daily). The County alleges that Daily caused or allowed the open dumping of waste in violation of Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2000)), on both September 15, 2000, and September 22, 2000. The alleged violations occurred at 341 North Park, Rochester, Sangamon County. On December 18, 2000, Daily filed petitions for review of the administrative citations pursuant to Section 31.1(d). 415 ILCS 5/31.1(d) (2000). The Board accepted these matters for hearing on December 21, 2000, and consolidated them on March 1, 2001.

These matters are before the Board today on cross motions for summary judgment. For the reasons set forth below, the Board grants the County's motion for summary judgment. Daily's motion for summary judgment is, consequently, denied.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act (415 ILCS 5/31.1 (2000)) authorizes the filing of administrative citations. The Board recently adopted its own procedural rules dealing specifically with administrative citation practice and procedure before the Board. *See* 35 Ill. Adm. Code 108.101, *et seq.*

The administrative citation process is one enforcement tool available to the Illinois Environmental Protection Agency (Agency) and units of local government under the Act. It is a much more streamlined process than that of a standard enforcement action brought under Section 31 of the Act (415 ILCS 5/31 (2000)). For example, statutory penalties for administrative citations are predetermined with no leeway given to the Board to consider either mitigating or aggravating factors. *See generally* 415 ILCS 5/42(b)(4-5) (2000).

In fact, the appellate court in *Miller v. PCB*, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994), described the Board's administrative citation process as follows: "the administrative

citation proceeding is to the Act as traffic citations are to the body of criminal law.” *Miller v. IPCB*, 267 Ill. App. 3d at 167, 642 N.E.2d at 482. Consistent with the rationale behind the administrative citation process, the Board’s new procedural rules, which took effect January 1, 2001, contemplate that the hearing on an administrative citation be held within 60 days after filing of a petition for review. *See* 35 Ill. Adm. Code 108.300(a). As discussed in more detail below, the pursuit of discovery and summary judgment has caused these matters to remain pending for more than one year. It has been the Board’s experience that these pre-hearing procedures are not necessary in administrative citations. Nevertheless, the Board will, in this instance, examine the motions for summary judgment now pending in these consolidated administrative citations.

PROCEDURAL HISTORY

The property at issue in these administrative citations is commonly referred to as 341 North Park, Rochester, Sangamon County, and is allegedly owned by Daily. AC 01-16 at 1; AC 01-17 at 1.¹ Daily maintains that he has resided at the site for more than 50 years. Daily Mot. at Exh. B, page 1.² According to Daily, the site consists of five to six acres, with his residence located at the southeastern portion of the property. *Id.* Daily maintains that he is “making the property more desirable for [his] grandchildren . . . [and is] in the process of improving the remainder of the property to enhance its park-like quality.” *Id.*

Daily alleges that in late 1999, the County filed an action in Sangamon County Circuit Court alleging that Daily violated a Sangamon County ordinance which, according to Daily, “was the equivalent of these consolidated administrative citation cases.” Daily Mot. at 3-4. During the course of that circuit court action, Daily alleges that he requested, and the County agreed to furnish, a “complete and specific list of the items which [the County] alleged to violate the county ordinance, and specifically requested the list in order to determine whether settlement was possible by addressing specific items.” Daily Mot. at 4.

On September 15, 2000, inspectors from the Sangamon County Department of Public Health, Chad Moorman and Allen Alexander, attempted to conduct an inspection of the site. Daily Mot. at 4. Daily, however, denied them access. *Id.* Mr. Moorman and Mr. Alexander obtained six photographs of the site on September 15, 2000, which now serve as the basis for AC 01-16. Thereafter, the County sought issuance of an administrative search warrant for the site. Daily Mot. at 4-5. A hearing was scheduled on September 21, 2000, for the purpose of addressing the requested warrant and a motion to dismiss filed by Daily. Daily Mot. at 5.

On September 21, 2000, prior to oral argument, the County dismissed the circuit court case. Daily Mot. at 5. Also on September 21, 2000, Daily contends that:

¹ The November 16, 2000 administrative citations are referred to herein as “AC 01-16 at ___” and “AC 01-17 at ___.”

² Daily’s motion for summary judgment is referred to herein as “Daily Mot. at ___.”

counsel for [the County] and for [Daily] reached an agreement whereby [Sangamon County Department of Health Inspectors Chad] Moorman and [Allen] Alexander would be permitted access to [Daily's] property on September 22, without issuance of such a search warrant; [and] again, the express purpose for the inspection was to develop a list of items which [the County] contended were illegal, in order to determine whether settlement was possible. Daily Mot. at 5.

Mr. Moorman and Mr. Alexander conducted an inspection of the site on September 22, 2000, and obtained approximately 100 photographs, which now serve as the basis for the alleged violations in AC 01-17.

These consolidated administrative citations (AC 01-16 for alleged violations on September 15, 2000 and AC 01-17 for alleged violations on September 22, 2000) were filed on November 16, 2000. On December 21, 2000, following receipt of Daily's petitions for review, the Board accepted the matters for hearing. On March 21, 2001, Daily filed amended petitions for review and a motion for judgment on the pleadings, to which the County did not respond. The Board denied the motion for judgment on the pleadings on April 19, 2001. Also in March 2001, Daily filed interrogatories with the County. The County's response to the interrogatories was the subject of a motion to compel filed by Daily on July 9, 2001. In addition to the written discovery, Daily also took the depositions of the two Sangamon County Department of Public Health inspectors and of their supervisor. A tentative hearing date of August 21, 2001 was set. On July 25, 2001, Daily sought a continuance of the tentatively scheduled hearing date in order to allow time for the filing of a motion for summary judgment. Thereafter, the instant motions for summary judgment were filed on September 24, 2001, by Daily and on October 17, 2001, by the County. Both motions for summary judgment were accompanied by motions for leave to file *instanter*. The motions for leave to file *instanter* are granted. On October 9, 2001, the County filed a response to Daily's motion for summary judgment. On December 20, 2001, the Board granted Daily's motion for leave to file a response to the County's motion for summary judgment. Daily's response was filed on December 24, 2001.

MOTIONS FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any 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. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In 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, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment."

Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Daily's Motion for Summary Judgment

Daily argues that he is entitled to partial or whole summary judgment for the following three reasons:

- (A) [The County] is estopped from pursuing these administrative citations, because this action was brought in response to [Daily's] specific request for information from [the County, which was] intended to [aid in pursuing] settlement of this matter;
- (B) Only 6 of the total of approximately 100 photographic pieces of evidence produced by [the County] were taken of property that is the subject matter of these administrative citations, as described in paragraph 9 of each of the administrative citations, and no genuine issue of material fact exists with respect to the materials depicted in those photographs, which do not reveal any items which violate any provision of the Illinois Environmental Protection Act; and
- (C) Even if all approximately 100 photographs are relevant to [the County's] administrative citation allegations, none of those photographs, as supported by [the County's] testimony and explained by [Daily's] affidavit, reveals any violation of the Illinois Environmental Protection Act, and therefore no genuine issue of material fact exists with respect to whether [Daily] violated the Illinois Environmental Protection Act as alleged by [the County]. Daily Mot. at 2-3.

In support of these allegations, Daily supplied the Board with a number of documents, including, but not limited to, a 22-page affidavit and the transcripts and exhibits from three discovery depositions.

Estoppel

Daily's Arguments. Daily first argues that summary judgment is appropriate because the County is estopped from pursuing these administrative citations, because the alleged violations are based on inspections purportedly conducted in response to his specific request for information from the County in furtherance of settlement. Daily alleges that the County "admits the express purpose of the visits to [Daily's] property were for purposes of obtaining a list for settlement purposes." Daily Mot. at 5. Contrary to Daily's understanding, the inspections resulted not in a list for settlement purposes, but in the filing of the instant administrative citations. *Id.*

Daily maintains that he has "substantial ground to reasonably rely upon [the County's] assertion that the inspection of [his] property was intended to develop a list with which to pursue settlement." Daily Mot. at 6. Daily also argues that he "had good reason to have challenged the

administrative search warrant request pending in [Sangamon County Circuit Court] . . . in that the ordinance under which the request for administrative search warrant had been filed was specifically limited to unincorporated areas of Sangamon County, whereas [Daily's] property is located within the incorporated Village of Rochester.³ *Id.*

In support of his arguments, Daily refers the Board to three cases: IEPA v. Wright, AC 89-227 (Aug. 30, 1990); Modine Mfg. Co. v. PCB, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2d Dist. 1990); and Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966). Although a specific discussion of these cases is not provided by Daily, he appears to rely upon them in support of the idea that a "reasonable reliance" on statements or agreements of "governmental agents" is grounds for estoppel. Daily Mot. at 7.

Daily admits that the County voluntarily dismissed the circuit court action, "it appeared an opportune time to determine whether an accommodation could be reached between [Daily] and [the County]." Daily Mot. at 7. For these reasons, Daily asks the Board to find that the County is estopped from pursuing these administrative citations. Daily Mot. at 6.

The County's Arguments. Contrary to Daily's assertion that the inspections were solely for the purpose of developing a list of items to be addressed in furtherance of settlement, the County maintains that it intended for the inspections to be routine. County Resp. at 3.⁴ Moreover, the County states that the Director of the Sangamon Public Health Department directed Mr. Moorman and Mr. Alexander to conduct a routine inspection of the site because the site had not been inspected for several months. *Id.* According to the County, the generation of a list of items needing to be cleaned up was of secondary concern. *Id.*

The County argues that Daily's "contention boils down to . . . whether the inspections of September 15, 2000 and September 22, 2000 were conducted as routine inspections, as [the County] intended, or in furtherance of settlement, as [Daily] contends." County Resp. at 3-4. The County maintains that there is a genuine issue of material fact regarding the nature of the inspections and that summary judgment is not appropriate. County Resp. at 4.

Board Discussion. Before addressing the merits of the estoppel argument, the Board briefly addresses Daily's assertion that he could have challenged, in circuit court, the administrative search warrant sought by the County because the County ordinance under which the search warrant was sought only applied to unincorporated areas of Sangamon County. Daily Mot. at 6. While this allegation has no bearing on our decision today, the Board addresses this point in order to clarify the authority under which the County inspected Daily's property for purposes of the instant administrative citations.

³ Daily also raises this issue again in his December 24, 2001 response to the County's motion for summary judgment.

⁴ The County's response to Daily's motion for summary judgment is referred to herein as "County Resp. at ___."

In issuing administrative citations, the County gets its authority from a delegation agreement with the Agency. Daily provided a copy of that delegation agreement as part of exhibit C to its motion for summary judgment. *See* Daily Mot. at Exh. C. The pending administrative citations were filed pursuant to the County's authority under the Act and the delegation agreement. Any authority which the County does or does not have under its own ordinances is irrelevant to the issues before the Board today. Clearly the County was acting within its delegated authority under the Act in conducting the inspections of Daily's property which are the subject matter of the two administrative citations pending herein. Accordingly, the Board finds that it clearly has jurisdiction over these matters and that any suggestion to the contrary by Daily is without merit.

Regarding the issue of estoppel, the facts which the Board relies upon in determining whether Daily is entitled to summary judgment on this theory are essentially not disputed. It is clear from the record before us that Daily requested a list from the County of those items at the site requiring removal. It is equally clear that during the inspections of September 15, 2000, and September 22, 2000, the County inspectors intended to create such a list. However, what is not present in the record before us is any evidence of a promise or assurance from the County that the creation of this list would ultimately lead to a complete and final resolution of the controversy. Moreover, there is no evidence that promises or assurances were made by the County to Daily that the inspections would not result in some sort of an enforcement action.

The Board has previously addressed the applicability of estoppel on actions by governmental units. In recognizing prevailing case law, the Board has consistently held that the "doctrine of estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another." People v. John Crane, Inc., PCB 01-76 (May 17, 2001), slip op. at 9; People v. Chemetco, Inc., PCB 96-76 (Feb. 19, 1998), slip op. at 10; and White and Brewer Trucking, Inc. v. IEPA, PCB 96-250 (Mar. 20, 1997), slip op. at 10. Furthermore, the Board recognizes that estoppel "should not be invoked against a public body except under compelling circumstances, [and] where such invocation would not defeat the operation of public policy. Crane, PCB 01-76, slip op. at 9, citing Gorgees v. Daley, 256 Ill. App. 3d 514, 518, 628 N.E.2d 721, 725 (1st Dist. 1993).

In Crane, the Board held that, "parties seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result . . . [a] party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue." Crane, PCB 01-76, slip op. at 9.

It is somewhat unusual that the issue of estoppel is before us on a motion for summary judgment. Nevertheless, the Board must consider the facts in a light most favorable to the non-movant. Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. Based on the particular facts before us, the Board finds that the County made no assurances that the inspections would automatically result in settlement of the case. Likewise, no assurances were made that enforcement actions would not be pursued.

The cases relied upon by Daily are readily distinguishable. In Wright, the Agency did not dispute allegations by Mr. Wright that an Agency inspector provided specific and definite

assurances that if the property was cleaned up within 30 days then there would be no fine for the alleged violations. Wright, AC 89-227, slip op. at 4. In reliance on these assurances, Mr. Wright cleaned up the property within the allowed time and was assured by the Agency inspector that “all would be okay.” *Id.*

In Modine, there were similar assurances by the Agency that certain violations would not result in enforcement. *See generally Modine*, 193 Ill. App. 3d 643, 549 N.E.2d 1379. In Hickey, the Illinois Supreme Court determined that estoppel was appropriate to prevent the State and City of Chicago from seeking to obtain ownership rights to property when the State and City had, for a period of more than 50 years, disclaimed ownership interest in the disputed property. *See generally Hickey*, 35 Ill. 2d 427, 220 N.E.2d 415.

The facts of the present administrative citations do not rise to the level necessary to justify application of the doctrine of estoppel to the County’s actions. Accordingly, Daily’s motion for summary judgment on the issue of estoppel is denied.

Defective Legal Description

Daily’s Arguments. Daily argues that only six of the total of approximately 100 photographic pieces of evidence produced by the County were actually taken of the property defined by legal description in the administrative citations. Daily Mot. at 7-8. Although not clearly enunciated, Daily appears to argue that a defective legal description (one that does not encompass the property as a whole) entitles him to judgment as a matter of law. Daily provides no legal support for this argument.

The County’s Arguments. In response to Daily’s allegations regarding the existence of any violation, the County first addresses the allegedly improper or incomplete legal description. In this regard, the County states that, “[a]ny error in the legal description of the property is not a fatal flaw, as [the County] has alleged the commonly-known address, and [Daily] acknowledges that this is the property that is the subject of the allegations contained in these Administrative Citations.” County Resp. at 4. The County maintains that the address of the property is all that is required and that summary judgment is not appropriate on this ground. *Id.* In the alternative, should the Board require a proper legal description, the County states that it will seek leave to amend the citations so as to correct the description. *Id.*

Board Discussion. The Board finds that summary judgment is not an appropriate remedy for the allegedly inaccurate legal description contained in the administrative citations. While the County does not deny the inaccuracy, it correctly points out that the street address of the property is also provided. Not only is the correct address of the property provided, but neither Section 31.1 of the Act (415 ILCS 5/31.1 (2000)) nor Section 108.202 of the Board’s procedural rules (35 Ill. Adm. Code 108.202) requires inclusion of an exact legal description in an administrative citation. Absent the legal description, there remains sufficient information in the citations to notify Daily as to the identity of the property at issue. Even if the Board finds the legal description to be defective, this defect does not entitle Daily to judgment as a matter of law. Accordingly, the Board denies Daily’s motion on the grounds that the legal description was defective.

Existence of Violations

Daily's Arguments. In Daily's final argument for summary judgment, he maintains that none of the approximately 100 photographs upon which the County bases their violations reveals any violation of the Act or the presence of any waste. Daily Mot. at 8-9. Therefore, Daily argues that there is no genuine issue of material fact regarding the existence of any violations and claims that summary judgment is appropriate. Daily Mot. at 9.

In support of his assertions that none of the items pictured in the numerous photographs can be considered a waste, Daily filed a 22-page affidavit. *See* Daily Mot. at Exh. B. In this affidavit, Daily explains each and every photograph taken by the County inspectors. With regard to the items in the photographs, Daily identifies the item, explains what it is used for, or what he intends to use it for in the future. Daily maintains that virtually every item depicted in the County's photographs is either currently being used or has a future intended use. *Id.* Daily also maintains that the County inspectors "admitted" that whether a material has any useful purpose is determinative of whether that material is a waste. Daily Mot. at 8. Daily asserts that, "a bonafide intention to use the materials will be determinative that the materials are not waste or discarded." *Id.* Daily, however, fails to provide any legal support for this proposition.

Daily urges the Board to consider the photographic evidence, Daily's affidavit, and the deposition testimony of County inspectors Mr. Moorman and Mr. Alexander, in considering whether the alleged violations exist. Daily Mot. at 9.

The County's Arguments and Motion for Summary Judgment. With regard to the photographic evidence, the County initially, in its response to Daily's motion for summary judgment, suggests that, "[i]f ever there were a genuine issue of material fact, this would be it . . . [and s]ummary judgment on this issue should be denied." County Resp. at 4-5.

The Board notes, however, that in its own motion for summary judgment, the County reverses this position and argues that there is no genuine issue of material fact with regard to certain specific items at the site, and that because these specific items are waste, summary judgment is appropriate for the County. *See generally* County Mot.⁵ The County states that it now believes, based upon admissions contained in Daily's affidavit (Daily Mot. at Exh. B), that there is no genuine issue of material fact regarding the presence of the alleged violations at the site. County Mot. at 3-4. Specifically, the County seeks summary judgment on the alleged violation of Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2000)).

In support of its request for summary judgment as to Section 21(p)(1) of the Act, the County refers the Board to the following cases: St. Clair County v. Fields, AC 90-64 (Aug. 22, 1991); and Sangamon County v. Miller, AC 92-37 (Dec. 17, 1992). In Fields, the Board adopted the definition of "litter" as contained in the Litter Control Act (415 ILCS 105/3(a) (1990)). The

⁵ The County's motion for summary judgment is referred to as "County Mot. at ___."

County maintains that the photographs and Daily's own affidavit prove the presence of litter at the site. County Mot. at 2-3.

In support of its position that there is litter on the property, the County claims that a "custom made hitch and handmade log splitter . . . have been discarded improperly . . . [and that] a great many other items on [Daily's] property fall into the category of potentially usable items that have not been used in some time and have not been stored as if they were intended to be used. County Mot. at 3. The County argues that according to the Board's decision in Miller, "many, if not all, of the items" at the site fall under the definition of litter. *Id.*

The County also argues that it is entitled to summary judgment as to the alleged violation of Section 21(p)(7) of the Act. In support of this assertion, the County refers to portions of Daily's affidavit in which Daily admits to the presence of "odds and ends" wood at the site. County Mot. at 4, citing Daily Mot. at Exh. B, page 19. The County maintains that the "odds and ends wood" located throughout the site constitutes general construction debris for purposes of Section 21(p)(7) of the Act. The County argues that, "there is no genuine issue of material fact that other wood items that were left on the property on the dates of the inspections violate these statutory provisions." County Mot. at 4. Accordingly, the County seeks entry of summary judgment in its favor.

Daily's Response to the County's Motion for Summary Judgment.⁶ In his response, Daily reiterates that he should not be found in violation of the Act as alleged in the administrative citations because he, "has now painstakingly reviewed and commented upon each photograph and in each and every instance has testified that the item is not a waste for which he can be held liable." Daily Resp. at 9. Daily specifically describes certain items depicted in the photographic evidence and again explains why the items shown in the photographs should not be considered openly dumped waste. *See generally* Daily Resp. at 4-7.

Daily also suggests that the Board should look beyond the definition of "litter" as set forth in the Litter Control Act (415 ILCS 105/3 (2000)). Daily Resp. at 1. Daily urges the Board to consider the Webster's Dictionary definition of terms such as, "discarded," "abandoned," and "dispose of." Daily Resp. at 2. Daily argues that "[c]ommon to all three words or phrases, there must be some action of getting rid of or having nothing further useful to do with an item for it to be "litter." Daily Resp. at 2. Daily argues that the County has failed to prove the existence of the alleged violations.

Finally, in his conclusion, Daily states that, "it seems clear no purpose would be served by sending this case to hearing." Daily Resp. at 9. Daily "requests that this Board, based upon the only evidence presented, which is virtually un rebutted, put an end to this proceeding by ruling in [his] favor on all allegations." *Id.*

⁶ Daily's response to the County's motion for summary judgment is referred to as, "Daily Resp. at ___."

Board Discussion. In light of the conflicting motions for summary judgment on the existence of waste, the Board will address the two motions together. As previously explained, when considering motions for summary judgment, the Board must consider the facts of each motion in the light most favorable to the non-movant. Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. While a cursory examination of the facts might initially suggest that there are genuine issues of material fact, the Board concludes that the information contained in the record, most notably, Daily's affidavit and the nearly 100 photographs, indicate that there is no genuine issue of material fact as to the presence and disorderly appearance of numerous items at the site. For example, there is no factual dispute as to the existence at the site of scattered piles containing, among other things, scrap wood, metal, wire, and concrete pieces. *See* Insp. Rpt. (9/15/00)⁷ at photo nos. 1538-2 and 1538-3; Insp. Rpt. (9/22/00) at photo nos. 1542-17, 1542-18, 1542-19, 1542-20, 1542-24, 1543-15, 1543-17, 1543-19, 1543-23, 1539-1, 1539-4, 1539-5, 1539-7, 1539-8, 1539-9, 1539-11, 1539-12, 1539-13, 1539-14, 1539-15, 1539-16, 1539-17, and 1539-18. Furthermore, many of these piles are located in areas that are overgrown with weeds. *See* Insp. Rpt. (9/15/00) at photo nos. 1538-2 and 1538-3; Insp. Rpt. (9/22/00) at photo nos. 1543-10, 1543-11, 1543-21, 1543-22, 1539-10, and 1539-11. There is no factual dispute regarding the presence of broken lawn furniture, tires, and scrap metal in or near the creekbed running through the site. *See* Insp. Rpt. (9/22/00) at photo nos. 1541-7; 1541-8; 1541-9; 1541-10; 1541-11; and 1541-12. There is no factual dispute as to the presence of what appears to be an old water heater dumped in an open area near the creekbed. *See* Insp. Rpt. (9/22/00) at photo no. 1541-13. The photographs from both September 15, 2000, and September 22, 2000, reveal numerous other items scattered throughout the site without protection from the elements and with weeds growing in and around them. *See generally* Insp. Rpts. (9/15/00 and 9/22/00). The Board finds that Daily's statements regarding his intentions to utilize, dispose of, or sell these various materials at some undetermined date in the future are not dispositive of the question of whether the items constitute a waste or litter.

The question of whether these items are located on the site in such a manner as to constitute a violation of Sections 21(p)(1) and (p)(7) of the Act, is a question of law for the Board to determine. Sections 21(p)(1) and (p)(7) provide:

No person shall:

* * *

- p. In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;

* * *

7. deposition of:

- (i) general construction or demolition debris as defined in Section 3.78 of this Act; or

⁷ The Sangamon County inspection reports are referred to as, "Insp. Rpt (9/15/00) at ___." and "Insp. Rpt. (9/22/00) at ___."

- (ii) clean construction or demolition debris as defined in Section 3.78a of this Act. 415 ILCS 5/21(p)(1), (p)(7) (2000).

The first question is whether Daily's conduct constitutes causing or allowing "open dumping" as defined in Section 3.24 of the Act 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 5/3.24 (2000). The Act defines "refuse" as "waste" (415 ILCS 5/3.31 (2000)) and defines "waste" as, "garbage . . . or other discarded material" (415 ILCS 5/3.53 (2000)). Despite the intentions expressed by Daily to somehow utilize all of the items depicted in the nearly 100 photographs provided by the County, the Board finds that many of these items are discarded materials that have been consolidated at a site that is not a sanitary landfill. For example, during the September 15, 2000 inspection, the County inspectors observed and photographed piles of debris, including scrap metal and dimensional lumber. *See* Insp. Rpt. (9/15/00) at photo nos. 1538-1, 1538-2, 1538-3, and 1538-6. Likewise, during the September 22, 2000 inspection, the inspectors observed and photographed areas of piled debris including dimensional lumber, scrap metal, tires, and broken lawn furniture that had been discarded or were being stored in an unsuitable and unsightly manner (*See generally* Insp. Rpt. (9/22/00)). Accordingly, the Board finds that Daily's activities constitute open dumping.

The next question, before finding a violation of Section 21(p)(1) of the Act, is whether the open dumping resulted in litter. As previously stated, the Board utilizes the definition of "litter" as contained in the Litter Control Act (415 ILCS 105/3(a) (1990)). *See Fields*, AC 90-64 (Aug. 22, 1991). That definition of "litter" provides:

"Litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle . . . motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2000).

In his response to the County's motion for summary judgment, Daily urges the Board to look beyond the well-established definition of "litter," found in the Litter Control Act and adopted in Board precedent, to definitions of other terms found in the Webster's Dictionary. The Board however, concludes that in order to determine whether items at Daily's site constitute "litter," the Board should look for guidance to the Miller case, which involved similar issues. In Miller, for example, there were a number of items which Miller claimed were not litter because he intended to use them in future construction projects. *See Miller*, AC 92-37, slip op. at 2. In Miller, the Board concluded, "[w]hile it is arguable that some of the items located on Mr. Miller's property are not litter, it is equally clear that many of the items are litter based on the above definition [from the Litter Control Act]. Miller, AC 92-37, slip op. at 3. The Board

concluded that, “photos of . . . furniture, appliances, abandoned vehicles, cans and other items throughout Mr. Miller’s property of an unsightly nature which have been discarded improperly,” were sufficient to find a violation of the Act. *Id.*

The Board reaches the same conclusion here. While there may be some items on Daily’s property that are used regularly and stored in such a manner to protect their future use, there are numerous other items, visible in the photographs and described in Daily’s affidavit, that are “of an unsightly or unsanitary nature, which [have] been discarded, abandoned or otherwise disposed of improperly (*See* 415 ILCS 105/3(a) (2000)). While Daily has expressed an intention to use every single discarded item on his property, at the time of the two inspections involved herein, 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. Those items include but are not limited to scrap wood, metal and wire, broken concrete, and an old water heater. Accordingly, the Board finds that even considering the facts in the light most favorable to Daily, the County is entitled to judgment as a matter of law as to the violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)).

For the alleged violation of Section 21(p)(7) of the Act, the Board looks to whether the open dumping resulted in the deposition of “general construction or demolition debris” as defined in Section 3.78 of the Act as follows:

“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.

General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste. 415 ILCS 5/3.78 (2000).

The Board concludes that the photographic evidence from both the September 15, 2000, and the September 22, 2000 inspections, coupled with Daily’s own admission in his affidavit, combine to prove the presence of openly dumped general construction and demolition debris at the site. The items depicted in the photographs attached to the two inspection reports are of the type that satisfy the definition of “general construction debris” set forth above. There are numerous photographs that depict general construction debris that has been deposited in an apparently haphazard and unsightly manner. *See generally* Insp. Rpt (9/15/00) and Insp. Rpt. (9/22/00). While Daily has expressed an intention to use the general construction and demolition debris, at the time of the inspections, the items were clearly not stored in such a way as to protect their

future use. Accordingly, the Board also finds, considering the evidence in the light most favorable to Daily, that Daily has violated Section 21(p)(7) of the Act.

While the Board has found that the County is entitled to an award of summary judgment, we also find that Section 31.1 of the Act does not support a finding of four distinct violations in this particular case. The County has alleged a separate violation of Section 21(p)(1) and Section 21(p)(7) for each of the two inspections conducted on September 15, 2000, and September 22, 2000 (for a total of four individual violations). Generally, Section 31.1 of the Act (415 ILCS 5/31.1 (2000)) provides an opportunity for Board review of a violation charged in an administrative citation before a potentially liable person could face more civil penalties from another administrative citation alleging the same violation based on the same circumstances. Section 31.1 provides expeditious timeframes in which a person and the Board must be notified of an alleged violation. *See* 415 ILCS 5/31.1(b), (c) (2000). The Board's procedural rules in turn contemplate a prompt resolution of all administrative citations, with a hearing generally required within 60 days after the Board receives a petition to contest the citation. *See* 35 Ill. Adm. Code 108.300.

When a set of circumstances do not constitute a separate and distinct violation, such as the failure to provide daily cover at a sanitary landfill, the Board's adjudication of an alleged violation should be completed before an additional administrative citation, alleging the same violation, can serve as the basis of an additional violation (and corresponding additional penalty) for the same circumstances at a site. If circumstances found to constitute a violation continue after the Board decides the case, however, a respondent may properly be subject to future prosecution by administrative citation.

The Board finds that, based on the specific facts of this case, the two open dumping violations that were first noted by the County on September 15, 2000, were continuing violations on September 22, 2000, as opposed to two separate violations. Accordingly, the County is entitled to a finding that Daily committed one violation of Section 21(p)(1) and one violation of Section 21(p)(7) of the Act.

PENALTY

When a violation is found in an administrative citation, the Board is required to impose a penalty. Penalties in administrative citation actions for violations of Section 21(p) of the Act are proscribed by Section 42(b)(4-5) of the Act, as follows:

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 a first offense and a \$3,000 for a second or subsequent offense, plus any hearing costs incurred by the Board and the Agency. The penalties shall be deposited into the Environmental Protection Trust Fund, to be used in accordance with the provisions of the Environmental Protection Trust Fund Act; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government. 415 ILCS 5/42(b)(4-5) (2000).

In these consolidated cases, the County seeks \$1,500 for each of the four violations alleged in the two consolidated citations, thereby requesting a total civil penalty of \$6,000. For the reasons set forth above, the Board has concluded that Daily is responsible for only one violation each of Sections 21(p)(1) and (p)(7) of the Act. Accordingly, the Board finds that the appropriate civil penalty is \$1,500 for each individual violation, or a total of \$3,000. Since this matter is being disposed of on a motion for summary judgment, there are no hearing costs to assess.

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

ORDER

1. Respondent, Everett Daily's (Daily) motion for summary judgment is denied. The County of Sangamon's (County) motion for summary judgment is granted.
2. Daily is found to have violated Sections 21(p)(1) and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2000)).
3. Within 30 days of the date of this order, Daily must, by certified check or money order, pay a total civil penalty of \$3,000. The certified check or money order, along with the remittance form, must be sent to:

Sangamon County Department of Public Health
Attention: James D. Stone, Director
2501 North Dirksen Parkway
Springfield, Illinois 62702

The case numbers, case names, and Daily's social security number or federal employer identification number must be included on the certified check or money order.

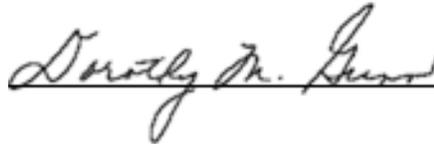
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2000)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).
5. Payment of this penalty does not prevent future prosecution if the violations continue.

IT IS SO ORDERED.

Board Member G.T. Girard dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 10, 2002, by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board