ILLINOIS POLLUTION CONTROL BOARD
June 16, 2005

COUNTY OF JACKSON,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 04-63
	)	(Site Code #0778095036)
EGON KAMARASY,	)	AC 04-64
	)	(Site Code #0778125013)
Respondent.	)	(Administrative Citation)
	)	(Consolidated)

DANIEL BRENNER, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF COMPLAINANT; and

GREGORY VEACH APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Today the Board finds that the respondent Egon Kamarasy (Kamarasy) violated numerous open dumping prohibitions of the Environmental Protection Act (Act) (415 ILCS 5 (2002)) at two sites in Jackson County. The violations were alleged in two separate administrative citations, one for each site, issued by the complainant, the County of Jackson (County). The Board consolidated the two administrative citations for hearing. As described below, Kamarasy is subject to a statutorily mandated $7,500 civil penalty, and must pay the hearing costs of the Board and the County.

Specifically, the Board finds that Kamarasy violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2002)) by causing or allowing the open dumping of waste resulting in litter and the deposition of general construction or demolition debris at a site in Makanda, Jackson County, referred to as the "Makanda site." The Board further finds that Kamarasy violated Sections 21(p)(1), (p)(3), and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2002)) by causing or allowing the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris at a site in Pomona Township, Jackson County, referred to as the "Carbondale site."

After finding the violations in this interim opinion and order, the Board directs the County and the Clerk of the Board to provide hearing cost documentation, to which Kamarasy may respond. After the time periods for these hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and any appropriate hearing costs.

Below, the Board first provides the legal framework for administrative citations. Next, the Board sets forth the procedural history of this case. This is followed by the Board's findings

of fact. The Board then discusses the County's alleged violations and Kamarasy's claimed defenses before the Board renders its legal conclusions.

LEGAL FRAMEWORK

Under the Act (415 ILCS 5 (2002)), an administrative citation is an expedited enforcement action brought before the Board seeking civil penalties that are fixed by statute. Administrative citations may be filed only by the Illinois Environmental Protection Agency (Agency) or, if the Agency has delegated the authority, by a unit of local government, and only for limited types of alleged violations at sanitary landfills or unpermitted open dumps. *See* 415 ILCS 5/3.305, 3.445, 21(o), (p), 31.1(c), 42(b)(4), (4-5) (2002); 35 Ill. Adm. Code 108.

The Agency or delegated local authority must serve the administrative citation on the respondent within "60 days after the date of the observed violation." 415 ILCS 5/31.1(b) (2002)); *see also* 35 Ill. Adm. Code 108.202(b). The Agency or delegated local authority also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. *See* 415 ILCS 5/31.1(c) (2002).

To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. If the respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(1) (2002); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the administrative citation, 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. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500. However, if the Board finds that the respondent "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) (2002); *see also* 35 Ill. Adm. Code 108.500(b).

PROCEDURAL HISTORY

On April 7, 2004, the County timely filed two administrative citations against Kamarasy, which the Board docketed as AC 04-63 and AC 04-64. AC 04-63 concerns the Makanda site and AC 04-64 concerns the Carbondale site.[1] Both site inspections, on which the respective administrative citations are based, took place on March 25, 2004, and both administrative citations were served on Mr. Kamarasy on April 2, 2004, by hand delivery. On May 7, 2004, Kamarasy timely filed separate petitions contesting each of the administrative citations.

In a May 20, 2004 order, the Board accepted for hearing Kamarasy's petition in AC 04-63, but granted Kamarasy leave to file an amended petition in AC 04-64 to correct an apparent

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[1] The Board cites the County's Makanda administrative citation as "AC 04-63 at _," and the County's Carbondale administrative citation as "AC 04-64 at _."

clerical error in setting forth the grounds for appeal. Kamarasy timely filed an amended petition in AC 04-64 on June 22, 2004, which the Board accepted for hearing in an order of July 8, 2004.[2] On August 30, 2004, the County filed a motion to consolidate AC 04-63 and AC 04-64, which the Board granted in a September 2, 2004 order.

On November 22, 2004, Board Hearing Officer Carol Webb conducted a hearing on the two administrative citations at the Jackson County Health Department in Murphysboro. At hearing, six witnesses testified: Don Terry, a solid waste inspector for the Jackson County Health Department; Kamarasy; Phillip McMurphy, an excavator; Archie Mays; James Taylor; and Kerry Grunloh. The latter three witnesses worked for Kamarasy at the sites. The hearing officer found all of the witnesses credible.[3] Tr. at 66, 68, 70, 73, 78.

Both parties offered exhibits into evidence at hearing, all of which were admitted into the record without objection. The County's lone exhibit consists of Terry's inspection reports for both sites.[4] For AC 04-63, Kamarasy's five exhibits consist of letters from the Illinois Department of Public Health, the Jackson County Health Department, a site sketch, and an invoice for work performed at the Makanda site. Kamarasy's exhibits for AC 04-63 are attached to a "Memorandum Supporting Petition to Contest Administrative Citation." For AC 04-64, Kamarasy's one exhibit is a receipt for work performed at the Carbondale site. Kamarasy's exhibit for AC 04-64 is attached to a separate "Memorandum Supporting Petition to Contest Administrative Citation."[5]

The County filed a brief on January 7, 2005, pertaining to both AC 04-63 and AC 04-64. Kamarasy filed a response brief on February 2, 2005, concerning AC 04-64, and another response brief on February 3, 2005, concerning AC 04-63. The County filed a reply brief on February 10, 2005, concerning both AC 04-63 and AC 04-64.[6]

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[2] The Board cites Kamarasy's petition to contest the Makanda citation as "04-63 Pet. at _," and his petition to contest the Carbondale citation as "04-64 Pet. at _."

[3] The Board cites the hearing transcript as "Tr. at _."

[4] The Board cites the County's exhibit as "County Exh. at _."

[5] The Board cites Kamarasy's exhibits for the Makanda site as "04-63 Exh. _ at _," and his memorandum for the Makanda site as "04-63 Memo at _." The Board cites Kamarasy's memorandum for the Carbondale site as "04-64 Memo at _."

[6] The Board cites the County's opening brief as "County Br. at _," and the County's reply brief as "County Reply at _." The Board cites Kamarasy's response briefs as "04-63 Resp. Br. at _" for the Makanda site, and "04-64 Resp. Br. at _" for the Carbondale site.

FACTS

The Agency has delegated administrative citation authority to the Jackson County Health Department (JCHD) by agreement.[7] Tr. at 8-9. Terry is a solid waste inspector with JCHD. Tr. at 7; County Exh. at 1. Terry received a certificate from the Agency documenting his solid waste site inspector training. Tr. at 8.

AC 04-63: Makanda Site

On March 25, 2004, Terry inspected a site located at the eastern end of Starvation Acres Road, in Makanda, Jackson County. The Makanda site is owned by Kamarasy and is also known as "Bittersweet Farm." Tr. at 10, 45-46; County Exh. at 1, 2, 4, 10. The site, which lacks any waste disposal or storage permit from the Agency, is assigned site code #0778095036. Tr. at 13-14; County Exh. at 2. The site is 40 acres in size and has a fenced pasture. Tr. at 10-11; County Exh. at 4.

The March 25, 2004 inspection of the Makanda site, on which the administrative citation is based, was conducted as a follow-up to Terry's December 5, 2003 inspection of the site. Tr. at 12; County Exh. at 2, 8. Based on Terry's December 5, 2003 site inspection, JCHD sent a "Violation Notice" to Kamarasy, dated January 9, 2004. 04-63 Exh. 4. In the notice, JCHD states that the letter "constitutes a Violation Notice pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act ('the Act') 415 ILCS 5/31(a)(1)." *Id*. at 1. The notice purports to be provided by the Agency and JCHD. *Id*.

The January 9, 2004 Violation Notice states that it "includes an explanation of the activities that the Illinois EPA and JCHD believe may resolve the specified violations, including an estimate of a reasonable time period to complete the necessary activities." 04-63 Exh. 4 at 1. The Violation Notice cautioned:

> Due to the nature and seriousness of the violations cited, please be advised that resolution of the violations may require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties. A written response . . . must be submitted via certified mail to the JCHD within 45 days of receipt of this letter. *** If a timely written response to this Violation Notice is not provided, it shall be considered to be a waiver of the opportunity to respond and to meet and the Illinois EPA and JCHD may proceed with a referral to the prosecutorial authority. *** Questions regarding this matter should be directed to Don Terry at [phone number]. *Id*. at 1-2.

Among the "corrective actions required," the Violation Notice states that Kamarasy must perform the following by February 13, 2004:

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[7] Section 4(r) of the Act provides in part: "The Agency may enter into written delegation agreements with any unit of local government under which it may delegate all or portions of its inspecting, investigating and enforcement functions." 415 ILCS 5/4(r) (2002).

> Remove all general refuse from this site and properly transport to a permitted landfill or transfer station.
>
> Scrap metal not disposed at a permitted landfill or transfer station may be taken to a scrap metal facility or recycling center. 04-63 Exh. 4 at 3.

The Violation Notice also directed Kamarasy to submit copies of receipts by February 27, 2004, documenting "the proper disposal or recycling of the waste." *Id*.

In response to the January 9, 2004 Violation Notice from JCHD, Kamarasy, in a January 15, 2004 phone call with Terry, agreed to remove all of the materials by February 13, 2004. A January 16, 2004 letter from Terry to Kamarasy purports to "act as a confirmation and summary" of their January 15, 2004 phone call. Tr. at 35-36, 53, 56-57; 04-63 Exh. 5 at 1. Terry's confirmation letter to Kamarasy states in part:

> During our phone conversation, you admitted that the debris was on the site and had originated from the demolition of mobile homes you were being required to remove by the [Illinois Department of Public Health]. You explained that the debris was taken to the above listed site so that recyclable and non-recyclable materials could be separated. You also stated that you wanted to work with us and the date given to you in the violation notice letter to properly clean up the open dump site (February 13, 2004) was more than sufficient to be able to accomplish the task.
>
> I explained that the process of taking demolition debris from one site to another for the purpose of salvaging was not permissible under Illinois law and that the demolition would have to take place where the mobile home had been in place. I also explained that this process should take place as quickly as possible; any materials that were going to be used or recycled should be covered until moved, and all waste would have to be properly disposed of at the landfill. ***
>
> Finally, I asked that you contact me when the site was clean so I could come do a compliance inspection. You stated you would do this . . . . 04-63 Exh. 5 at 1-2.

Terry conducted the March 25, 2004 inspection from a public road at the Makanda site's gate, without entering Kamarasy's property. The inspection lasted three minutes, from 2:32 p.m. to 2:35 p.m. Tr. at 31; County Exh. at 1, 2, 4. Terry observed a pile of debris on the site, approximately 100 yards east of the gate. The pile included dimensional lumber, paneling, and metal siding. Tr. at 10-12, 51-52; County Exh. at 2, 4, 7. The debris pile, which was approximately 100 cubic yards in volume, was roughly the same size and in the same location as it had been during the December 5, 2003 inspection. Tr. at 10, 12, 13; County Exh. at 2, 8, 10, 11. The December 5, 2003 inspection was also conducted from the gate, and took five minutes, from 9:10 a.m. to 9:15 a.m. County Exh. at 8.

Kamarasy brought the materials to the Makanda site from another property where he had a mobile home park. The mobile home park is known as "Raccoon Valley Mobile Home Park,"

which is approximately one mile from the Makanda site. Kamarasy has owned and operated the mobile home park for over 20 years. Tr. at 12, 21, 46-47, 49-50, 53, 66-67.

On November 12, 2003, the Illinois Department of Public Health (IDPH) inspected Raccoon Valley Mobile Home Park. In a November 19, 2003 letter from IDPH to Kamarasy, IDPH referred to the site visit as an "annual licensure inspection," the purpose of which was to "determine compliance with the Mobile Home Park Act and Manufactured Home Community Code." 04-63 Exh. 1 at 1. The IDPH letter stated that Kamarasy was out of compliance and had to take numerous "actions . . . to correct the violations," including:

> Remove or repair the manufactured homes at sites 9, 51A, and 59 which have the appearance of being abandoned. The homes are potentially hazardous to children and other community residents due to available access through broken windows and/or unsecured doors. The home at site 59 is a REPEAT violation. Remove and properly dispose of the rubble from homes being dismantled at sites 12 and 31. Correct by December 12, 2003. *Id*. at 2.

The debris at the Makanda site came from the dismantling of several mobile homes that had been abandoned at the Raccoon Valley park. Tr. at 47-50. Kamarasy owns the lots on which the mobile homes were located. Other persons owned and eventually abandoned the mobile homes. These persons rented the lots from Kamarasy. Tr. at 49. The photographs from both the December 5, 2003 and March 25, 2004 inspections by Terry show no discernable intact mobile homes or large portions of mobile homes in the pile, but rather only pieces of debris. County Exh. at 7, 10, 11.

Kamarasy had metals from the debris pile at the Makanda site segregated and then recycled off-site. Kamarasy also had dimensional lumber from the pile used for barn and fence repairs. In mid-December 2003, after the debris was moved from the trailer park to the Makanda site, Kamarasy contacted an excavator, Phillip McMurphy, to remove the rest of the pile from the Makanda site. The removal work was delayed, however, because McMurphy was concerned that the Makanda site would be too muddy to allow access for a backhoe and tractor trailer. Tr. at 50, 54-56, 57-58, 66-69. McMurphy testified:

> I never actually seen the pile. It was -- I was working at various places and just, when [Kamarasy] called, I knew that, if I tracked the road up, we were going to be in trouble there, so I couldn't get my big equipment in there is the bottom line. Tr. at 68-69.

By mid-April 2004, the remaining debris was removed from the Makanda site and disposed in a landfill. Tr. at 50, 54-55, 57-58; 04-63 Exh. 3.

AC 04-64: Carbondale Site

On March 25, 2004, Terry inspected a site located at 786 Green Ridge Road, in Pomona Township, Jackson County. The site is referred to, however, as the "Carbondale site." Terry entered the site to inspect it. The site is owned by Kamarasy and is several hundred acres in size.

Tr. at 14, 38, 58-59; County Exh. at 12-13, 15, 59. The site, which lacks any waste disposal or storage permit from the Agency, is assigned site code #0778125013. Tr. at 17; County Exh. at 13. There were no dwellings on the site, and Kamarasy raises horses there. Tr. at 16, 59; County Exh. at 15. Kamarasy's home is located on a site adjacent to the Carbondale site. Tr. at 59.

The March 25, 2004 inspection was conducted as a follow-up to Terry's March 11, 2004 inspection of the site. Tr. at 12; County Exh. 1 at 2, 8. The March 25, 2004 inspection lasted five minutes, from 2:25 to 2:30 p.m. The March 11, 2004 inspection took ten minutes, from 11:05 a.m. to 11:15 a.m. County Exh. at 8. During the March 25, 2004 inspection, Terry observed a pile of debris on the site. The pile, which was approximately 10 cubic yards in volume, included ash, landscaping waste, dimensional lumber, metal frames, fence posts, and cans, a metal piece of sink, and sections of laminate counter tops. Tr. at 14-15, 40; County Exh. at 13, 15, 24-26.

At the time of the March 25, 2004 inspection, the debris pile was in the same general location as it was during the March 11, 2004 inspection. County Exh. at 13. However, the debris pile was approximately 6 cubic yards smaller on March 25, 2004, than it was on March 11, 2004. Tr. at 16; County Exh. 1 at 13, 16, 19-21. Most of the material in the debris pile on March 25, 2004, was charred from being burned, including charred metals, counter tops, and dimensional lumber. Tr. at 14-15, 17; County Exh. at 13, 15, 24-26, 63. Metal fence posts were burned to remove poison ivy. Tr. at 64.

There is conflicting testimony on whether the pile of debris on the Carbondale site was visible from the public road. Terry testified that he could see the debris pile from Green Ridge Road. Tr. at 40. Kamarasy, however, testified that the "total distance from the road to the pile is 510 feet, and the pile cannot be seen from the road." Tr. at 62.

Kamarasy admitted that he burned materials on the Carbondale site. The materials came from his horse farm operations at the site and his home on the adjacent site. Tr. at 59-64, 71. Kamarasy explained: "that pile existed for years. We always burned the material there and what was left over, the metals were then recycled after we collected enough . . . ." Tr. at 64.

DISCUSSION

The Board first sets forth the provisions of the Act allegedly violated at the Makanda and Carbondale sites. For each site, the Board then separately discusses the alleged violations and Kamarasy's claimed defenses before rendering the Board's legal conclusion on whether Kamarasy violated the Act. The Board concludes by discussing civil penalties and hearing costs.

Alleged Violations

The County issued two administrative citations to Kamarasy, alleging two open dumping violations at the Makanda site and three open dumping violations at the Carbondale site. Specifically, the County's administrative citations allege that Kamarasy violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2002)) at the Makanda site and

Sections 21(p)(1), (p)(3), and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2002)) at the Carbondale site. AC 04-63 at 2; AC 04-64 at 2.

Sections 21(p)(1), (p)(3), and (p)(7) of the Act provide in relevant part:

> No person shall: In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> 1. litter;
>
> * * *
>
> 3. open burning;
>
> * * *
>
> 7. deposition of:
>
>   i. general construction or demolition debris as defined in Section 3.160(a)of this Act . . . . 415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2002).

Section 21(a) of the Act, which is referred to in Section 21(p), provides:

> No person shall:
>
> Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2002).

The County bases its allegations on the March 25, 2004 site visits conducted by County inspector Terry. AC 04-63 at 1; AC 04-64 at 1. The County seeks a $1,500 civil penalty for each of the five alleged violations (two alleged violations at the Makanda site and three alleged violations at the Carbondale site), for a total civil penalty of $7,500.

AC 04-63: Makanda Site

Kamarasy denies both alleged violations at the Makanda site: Sections 21(p)(1) and (p)(7) of the Act. 04-63 Pet. at 2-3; 04-63 Memo at 1. Kamarasy raises numerous alleged defenses, each of which the Board addresses below in reviewing the elements of the alleged violations.

No "Direct Observation"

Section 31.1(b) of the Act provides in part:

> Whenever Agency personnel or personnel of a unit of local government to which the Agency has delegated its functions pursuant to subsection (r) of Section 4 of this Act, *on the basis of direct observation*, determine that any person has violated any provision of subsection (o) or (p) of Section 21 of this Act, the Agency or such unit of local government may issue and serve an administrative citation upon

such person within not more than 60 days after the date of the observed violation.
415 ILCS 5/31.1(b) (2002) (emphasis added).

Kamarasy argues that Terry could not have personally observed the specific items of debris in the pile because Terry was too far away and only there for three minutes. According to Kamarasy, from where Terry stood at the gate several hundred feet from the debris pile, Terry "could not possibly have identified the specific items in the debris pile, such as dark paneling and metal siding, that he reported to have personally observed." 04-63 Memo at 5, 37-38. Kamarasy continues: "Nor does the photograph taken by Mr. Terry make it possible to identify, with the naked eye, any such specific items." *Id.* at 5.

Kamarasy maintains that Terry therefore made no "direct observation" of what materials were in the pile on March 25, 2004, the only date at issue for this administrative citation. 04-63 Memo at 5, 11-13, 37 (citing 415 ILCS 5/31.1(b) (2002)). Kamarasy also states that Terry's report was "demonstrably inaccurate" because the metal siding he described as present was already removed from the Makanda site by March 25, 2004, for off-site recycling. *Id.* at 6. Kamarasy argues that, at best, Terry recalled seeing those items based on his December 5, 2003 inspection and assumed they were still present on March 25, 2004. *Id.* at 12-13. Kamarasy also argues that Terry was an "inexperienced inspector," stressing that Terry had been a solid waste inspector for only 17 months at the time of hearing (Tr. at 7-8), and for only approximately 8 months at the time of the March 2004 site inspection. 04-63 Resp. Br. at 1, 5.

According to the County, Kamarasy's argument, that the Board should disregard Terry's observations based on Terry's alleged lack of credibility, is unpersuasive because: "virtually all the inspector observed, recorded, and testified to is corroborated by the Respondent." County Br. at 4. The County maintains that Terry has "consistently stated what he observed and put that information into his reports and reiterated all of his observations at the hearing." *Id.* Moreover, the County notes, Kamarasy has "admitted the pile contained debris consisting of materials from abandoned mobile homes; and that he put the debris on his land." *Id.*

The Board finds that Terry, the inspector, had an unobstructed view of the debris pile, as corroborated by the photographic evidence. The pile, including specific items such as dimensional lumber, can be plainly seen in the photo taken by the inspector. The Board hearing officer found Terry's testimony credible, and Terry is an Agency-certified solid waste inspector. In addition, Kamarasy does not dispute that the pile included debris from the abandoned mobile homes. Accordingly, the Board finds that Terry directly observed the debris pile. The purported "failure to personally observe" defense to liability for alleged violations of Sections 21(p)(1) and (p)(7) is of no aid to Kamarasy.

Following IDPH Order

Kamarasy next states that the IDPH "ordered him to remove certain abandoned and broken mobile homes from the mobile home park" he owned and operated. 04-63 Memo at 4. Kamarasy states that IDPH did not allow him to "leave the abandoned homes at the mobile home park until he managed to sell or recycle the usable parts from the homes." *Id.*

According to Kamarasy, he "attempted to comply with the IDPH directive" when he "relocated the abandoned mobile home structures and materials in question" to the Makanda site, where "workers continued the work of dismantling the structures, separating the recyclable from the non-recyclable materials, in order to sell whatever materials from the mobile homes were reusable and dispose of the rest." 04-63 Memo at 4-5. Kamarasy adds that "he thought, and had every reason to believe that his actions were legal and not in violation" of the Act. *Id*. at 5. Kamarasy argues that he therefore should not be liable for alleged the violation of Section 21(p)(1) or (p)(7) and emphasizes that he did not believe moving the materials from one of his properties to another was unlawful. *Id*.

The County states that Kamarasy admits the following: (1) he owned the Makanda site at the time of the March 25, 2004 inspection; (2) he caused the debris from the mobile home park to be deposited at the Makanda site; and (3) at the time of the March 25, 2004 inspection, the debris pile consisted of abandoned mobile homes. County Br. at 3. The County further states that little had changed at the site between the December 5, 2003, and March 25, 2004 inspection. *Id*. According to the County therefore, Kamarasy has admitted, and the record is otherwise clear, "to every factual element needed to show Section 21(p)(1) and (7) were violated." *Id*. at 6.

The Board finds this alleged defense unpersuasive. First, the IDPH did not order Kamarasy to deposit debris at the Makanda site. That was Kamarasy's choice. In fact, the IDPH order directed Kamarasy to "[r]emove *and properly dispose of* the rubble from homes being dismantled." 04-63 Exh. 1 at 2 (emphasis added). Instead, Kamarasy deposited the materials at the Makanda site, and there they remained in a pile for several months. Kamarasy does not explain why the materials were not sent directly from the mobile home park to the landfill.

Whether Kamarasy knew that his actions were unlawful is irrelevant here. The Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. *See* People v. Fiorini, 143 Ill. 2d 318, 336, 574 N.E.2d 612, 621 (1991) ("knowledge or intent is not an element to be proved for a violation of the Act. This interpretation of the Act . . . is the established rule in Illinois."); *see also* Freeman Coal Mining v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974) (the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to find liability).

"Open Dumping" of "Waste"

To prove a violation of Section 21(p)(1) or (p)(7), the County must first prove a violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2002)). Section 21(a) provides that "[n]o person shall: Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2002). "Open dumping" is defined 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 (2002). A "sanitary landfill" is defined in part as "a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act." 415 ILCS 5/3.445 (2002). "Refuse" means "waste." 415 ILCS 5/3.385 (2002). The Act defines "waste" as:

> [A]ny garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility 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 . . . . 415 ILCS 5/3.535 (2002).

Kamarasy argues that the debris pile, "while perhaps unsightly," was not an "open dump" under the Act. According to Kamarasy, under the Act's definition of "open dumping," the County "must show that he created a 'disposal site' on his land." 04-63 Memo at 14. Surely it cannot be true, Kamarasy maintains, that any time a homeowner places a broken chair or piece of plywood down in his backyard, he has thereby created a "disposal site" under the law. *Id*., citing Alternate Fuels, Inc. v. IEPA, 2004 WL 2359398 (Ill. Sup. Ct 2004).

Kamarasy recognizes that his debris pile was larger in scale than the piece of plywood in his hypothetical, but he maintains that size does not matter "when it comes to determining which piles of materials do or do not constitute a 'disposal site.'" 04-63 Memo at 14. Instead, according to Kamarasy, what matters is the likelihood that the pile will cause "pollution," and a "disposal site" is "a place where material is disposed of in such a way that it is likely to cause pollution." *Id*.

Kamarasy argues that depositing the debris on the Makanda site "did not introduce pollutants into the environment." 04-63 Memo at 5, 9. Kamarasy states that he "did not cause the debris to enter the environment, nor make it likely that polluting materials would be emitted or discharged, or otherwise disseminated from the site." *Id*. at 9, 15. According to Kamarasy, he was also not operating a "commercial waste dump facility" at the Makanda site or "allowing others to dump there." *Id*. at 5.

Kamarasy maintains that the Act's definition of "disposal" sheds light on the meaning of "disposal site," and which debris piles qualify. 04-63 Memo at 15. The Act defines "disposal" as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. *Id*., quoting 415 ILCS 5/3.185 (2002).

According to Kamarasy, the definition of "disposal" requires not only the placing of waste on land, which he concedes he did, but also placing the waste in such a way that the waste would be likely to "enter the environment," or be "emitted" into the air or "discharged" into the water. 04-63 Memo at 16. Kamarasy argues that to hold that any debris pile "outside of a building" has necessarily entered the environment would render the phrase "so that such waste . . . may enter the environment" in the definition "completely superfluous." *Id*. The legislature must have meant, Kamarasy continues, that the concept of "entering the environment" put "some limitation on the notion of placing waste on the land." *Id*.

Kamarasy argues that to prove the existence of a "disposal site," it must be shown that waste or some constituent of the waste "did enter or is likely to enter (freely) into the environment, or be emitted into the air or be discharged into the waters." 04-63 Memo at 17. Kamarasy maintains that the County cannot show that any siding, paneling, or dimensional lumber was likely to enter the environment, and so the County cannot make its *prima facie* case. *Id*. at 17, 33. According to Kamarasy, because no "disposal" took place at the Makanda site, it was not a "disposal site," and thus could not be an "open dump" under the Act. *Id*. Kamarasy contends that to not require a showing of a "significant likelihood" of pollution would render the Act "unconstitutionally vague." *Id*. at 31, 33.

The County maintains that Kamarasy is incorrect in stating that an element of a violation is that "the debris had been or was likely to be emitted into the environment." County Br. at 5. The County argues that "[p]roof of dumping is all that must be shown," and notes that the General Assembly intended that the provisions of the Act be "liberally construed." *Id*., citing 415 ILCS 5/2 (2002). According to the County:

> A showing of actual or likely emission or pollution runs starkly counter to the broad, preventive, and remedial purpose of the Act; and would make any successful prosecution under Section 21(p) nearly impossible and subject to overly technical scientific theories and data. *Id*.

The Board agrees with the County. The record shows that Kamarasy brought to the Makanda site roughly 100 cubic yards of miscellaneous debris from abandoned mobile homes. Kamarasy admits that he deposited the debris in a pile on the ground. Some metals and dimensional lumber were removed from the pile for re-use, but the rest of the materials were eventually sent to a landfill. On the date of the March 25, 2004 inspection, some three and one-half months after the pile was first observed by the County, the pile remained largely unchanged. This was therefore not an instance of structures being demolished, followed by the timely removal from the demolition site of the resulting debris for proper off-site disposal or recycling. *See* EPA v. PCB, 219 Ill. App. 3d 975, 579 N.E.2d 1215 (5th Dist. 1991).

The Board finds that under these circumstances, materials in the debris pile at the Makanda site were "discarded" and therefore constitute "waste" under the Act. *See* Alternate Fuels v. IEPA, 2004 Ill. LEXIS 1616, 33 (Ill. Sup. Ct 2004) (materials remain "discarded" when they are not "diverted from becoming waste and returned to the economic mainstream"). Further, it is undisputed that Kamarasy's site does not meet the requirements for a sanitary landfill. Neither the Board nor the courts have required that waste brought to a location and dumped on the land, and allowed to remain there for months, must then leach or emit pollutants before that site can be considered a "disposal site" for purposes of the Act's definition of "open dumping." Indeed, the Board has held to the contrary. *See* IEPA v. Yocum, AC 01-29, AC 01-30 (cons.) (June 6, 2002). The Board finds that Kamarasy "open dumped" waste at the Makanda site.

Resulting in "Litter"

The Board has adopted the definition of "litter" provided in the Litter Control Act for

purposes of Section 21 of the Act. *See* St. Clair County v. Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991). The Litter Control Act defines "litter" as:

> [A]ny discarded, used or unconsumed substance or waste [and] 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 anything else of any unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2002).

Kamarasy argues both that the debris at the Makanda site was not "litter" and that the Litter Control Act "expressly permits . . . the dumping of a pile of non-polluting and non-littering debris on one's own property, some to be recycled and the rest disposed of." 04-63 Memo at 9-10.

First, Kamarasy maintains that the definition of "litter" in the Litter Control Act is so broad that it "completely fails to answer the basic question [of] what kind of dumping on one's own property is the kind that results in littering, and what kind does not?" 04-63 Memo at 20. According to Kamarasy, without the answer to that question, a homeowner would have to "read the inspector's mind" to know if, for example, the "common practice of mulching one's grass clippings back into one's lawn" would lead to issuance of an administrative citation. *Id*.

Kamarasy argues that the County wants the Board to give the inspector "sole and absolute power to decide what is litter," effectively accepting that Terry "knows litter when he sees it." 04-63 Memo at 20. This, according to Kamarasy, would be a "blatant violation of the Separation of Powers Clause of the Illinois Constitution." *Id*. "The inspector is no more authorized than the Board to make new law about what is and is not pollution." *Id*. at 34.

Kamarasy maintains, however, that the definition of "litter" is not flawed but simply cannot be read in isolation; the Litter Control Act must be read in its entirety. 04-63 Memo at 21. Kamarasy quotes from the legislative findings in the Litter Control Act:

> [T]his Act is, therefore, necessary to provide for *uniform prohibition* throughout the State of *any and all littering* on *public or private* property so as to protect the health, safety and welfare of the people of this State. *Id*., quoting 415 ILCS 105/2 (2002) (emphasis by Kamarasy).

Kamarasy maintains therefore that the "notion of unlawful littering should be 'uniform' in the State of Illinois" and that to prove a violation of the Act for open dumping resulting in litter, the County must prove that littering took place in violation of the Litter Control Act. *Id*.

Kamarasy also quotes from two prohibitions in the Litter Control Act. Section 4 provides in part:

> No person shall dump, deposit, . . . [or] discard . . . litter . . . unless
> * * *

> (c) the person is the owner or tenant in lawful possession of the property . . . and *does not create a public health or safety hazard, a public nuisance, or a fire hazard*. 04-63 Memo at 21, quoting 415 ILCS 105/4 (2002) (emphasis by Kamarasy).

Kamarasy quotes from Section 6 of the Litter Control Act:

> No person shall allow litter to accumulate upon real property, of which the person charged is the owner or tenant in control, *in such a manner as to constitute a public nuisance or in such a manner that the litter may be blown or otherwise carried by natural elements on to the real property of another person*. 04-63 Memo at 22, quoting 415 ILCS 105/6 2002) (emphasis by Kamarasy).

Kamarasy argues there is no evidence that he created "a public health or safety hazard, a public nuisance, or a fire hazard" or that the debris pile was accumulated so as to "constitute a public nuisance" or such that items may be "blown or otherwise carried" to another's real property. 04-63 Memo at 22. Accordingly, Kamarasy argues that he did not violate the Litter Control Act, and therefore did not violate the Act's prohibition on open dumping resulting in litter. *Id*.

Reading Sections 4 and 6 of the Litter Control Act, Kamarasy maintains that the Litter Control Act "expressly grants" him permission to do what he did at the Makanda site: "he is lawfully entitled to deposit those things on his own land, so long as those things do not form a public nuisance, migrate to the neighbor's property, or create a health, safety, or fire hazard." 04-63 Memo at 23, 25.

Kamarasy argues that the Board should not interpret the Act to prohibit conduct authorized by the Litter Control Act, for to do that:

> [W]ould render one or the other Acts unconstitutional, since, taken together, the two statutes would then tell Illinois citizens that the same act of creating a debris pile on one's own land in such a way that it does not spread or emit or discharge onto other land is both lawful and unlawful at the same time. 04-63 Memo at 10.

According to Kamarasy, this would run afoul of constitutional due process, a basic tent of which is that "a citizen must be able to reasonably ascertain whether an act he is contemplating is lawful or not." *Id*. at 29, 38-39.

In Kamarasy's view, if the Board finds his activities at the Makanda site unlawful under the Act, even though they are "explicitly lawful under the Litter Control Act," the Board "would be, in effect, making new legislation . . . in violation of the Separation of Powers principle of the Illinois Constitution." 04-63 Memo at 33-34 ("it cannot be left to the executive branch of government, whether that means a county health department inspector or this Board, to decide arbitrarily and on its own what constitutes unlawful litter and what does not"). Kamarasy maintains that these arguments apply with equal force to the charge of open dumping resulting in the deposition of demolition debris. *Id*. at 30.

The County states the Board and the courts have already rejected Kamarasy's argument that the definition of "litter" is so unclear that "one cannot know what one is to avoid doing," concluding that the word "litter" is "clearly understood." County Br. at 5. The County also argues that a violation of the Litter Control Act is not a condition precedent to a violation of the Act for open dumping resulting in litter: the two statutes are "cumulative," with the Act pertaining to littering in the "open dumping context." *Id.* The County emphasizes that neither the Board nor any court has found that the Litter Control Act applies "to any facet of a Section 21 case other than to the definition of 'litter.'" *Id.*

The County adds:

> The [L]itter [C]ontrol [A]ct is a criminal provision. The present proceedings are civil. This is the difference between the two. Respondent is essentially arguing that a civil violation under Section 21 of the [E]nvironmental [P]rotection [A]ct is the same as a criminal violation under the [L]itter [C]ontrol [A]ct, and vice-versa. This is absurd. The two acts are not interchangeable. County Reply at 3.

The Board notes that Kamarasy's argument that the term "litter" under the Act is so vague as to be unconstitutional was addressed by the Appellate Court in Miller v. PCB, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994):

> Miller's argument the term "litter" is unconstitutionally vague is similarly unconvincing. *** A person of common intelligence can understand the term "litter." *** Given its ordinary meaning, "litter" refers to material of little or no value which has not been properly disposed of. The examples of litter set forth in the Litter Control Act [citation omitted] provide additional guidance. Miller, 267 Ill. App. 3d at 168-69; 642 N.E.2d at 483.

Under Miller, Kamarasy has not established any of the constitutional infirmities he alleges. The meaning of "litter" under the Act is plain, and therefore not susceptible to Kamarasy's "separation of powers" and "due process" arguments based on vagueness. Kamarasy admits that he brought miscellaneous debris from abandoned mobile homes to the Makanda site and dumped it on the ground. Over 100 cubic yards of debris was observed on December 11, 2003. Nearly that much of the debris remained in the pile months later on March 25, 2004, the date on which the administrative citation is based. Much of the material was eventually landfilled. The Board finds that the pile of materials at the Makanda site included discarded substances that fall within the definition of "litter."

The Board does not have jurisdiction to decide whether the Litter Control Act has been violated. As the County notes, the Litter Control Act is enforced through criminal prosecution in the courts. *See* 415 ILCS 105/8, 10 (2002). The Board does have jurisdiction, however, to decide whether the Act has been violated. Here, that decision depends simply on whether the County can demonstrate that Kamarasy caused or allowed "open dumping" ("the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill") of "waste" ("discarded material") in a manner that results in "litter." The

Board makes no comment on what the elements of a Litter Control Act violation are, but it is hardly inconceivable that the General Assembly might require more for criminal than civil liability to attach.

The Litter Control Act was enacted in 1974, over a decade before enactment of the Act's Section 31.1 administrative citation procedure for prosecuting open dumping. *See* P.A. 84-1320 (eff. Sept. 4, 1986); P.A. 85-1346 (eff. Aug. 31, 1988); P.A. 78-837 (eff. Jan. 1, 1974). The General Assembly did not, and the Board cannot, graft a violation of the Litter Control Act onto the Act's Section 21(p)(1) prohibition. A Litter Control Act violation is not an element of a violation of the Act. Kamarasy cites no authority to the contrary.

Indeed, the relevant provisions of both statutes have been amended numerous times over the years and the General Assembly has not taken any of those opportunities to prevent the Board's long-standing statutory construction. *See* Mund, AC 90-64, slip op. at 4, 6 (first Board use of Litter Control Act definition of "litter" for purposes of Section 21); *see*, *e.g.*, P.A. 88-670 (eff. Dec. 2, 1994) (amending Section 31.1 of the Act and Sections 3 and 4 of the Litter Control Act). Moreover, the Litter Control Act itself provides that its penalties "are in addition to, and not in lieu of, any penalties, rights, remedies, duties or liabilities otherwise imposed or conferred by law." 415 ILCS 105/8(c) (2002).

Kamarasy's constitutional and statutory construction arguments are unavailing. The Board therefore holds that Kamarasy violated Section 21(p)(1) of the Act at the Makanda site by causing or allowing the open dumping of waste, resulting in "litter."

Resulting in the Deposition of "General Construction or Demolition Debris"

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

> [N]on-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 5/3.160(a) (2002).

Kamarasy concedes that the pile observed by Terry on March 25, 2004, at the Makanda site "contained the remaining parts from several abandoned mobile home structures." 04-63

Memo at 22. Kamarasy also states that he does not know if the pile contained "general construction or demolition debris" because "he does not know if his actions constituted 'demolishing' the abandoned mobile homes, or whether the materials therefrom should technically be described as 'debris.'" *Id*. at 23.

Kamarasy nevertheless argues that it was "a violation of his due process rights and a violation of the Separation of Powers principle for him to be charged with two violations for what amounts to one (allegedly) wrongful act." 04-63 Memo at 9. The County, according to Kamarasy, is "effectively charging Mr. Kamarasy twice for the same demolition debris, simply by the deceit of renaming the mobile home parts 'demolition debris', after first naming them 'litter'." *Id*. "This sort of punitive approach was the sort of thing the legislature surely intended to avoid when it established the administrative citation procedure," according to Kamarasy. 04-63 Resp. Br. at 17.

Kamarasy maintains that "fundamental fairness" dictates that he cannot be "convicted" of both charges "on the basis of a single act of depositing a single type of material." 04-63 Memo at 23-24. According to Kamarasy, "[t]his is not a case of open dumping of both kinds of materials, litter and construction or demolition debris, where two separate offenses properly [are] chargeable." 04-63 Resp. Br. at 12. Kamarasy also argues that the County and Terry, in seeking a total civil penalty of $3,000 for two violations based on the one act, "are attempting to overrule the legislature and create a new law of their own." 04-63 Memo at 36.

The County emphasizes Kamarasy's admission that "the pile contained debris consisting of materials from abandoned mobile homes; and that he put the debris pile on his land." County Br. at 4. The County further notes that the Board has previously found multiple violations for the same activity and, according to the County, "the Act intends that each and every violation declared in Section 21(p) is a separate and distinct violation even if the debris causing each of these violations is the same." *Id*. at 6.

Kamarasy cites no authority for the proposition that his open dumping of waste can violate only one provision of the Act. The Board and the courts have long found that a single act or omission may constitute multiple violations of the Act. *See*, *e.g.*, ESG Watts v. PCB, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996); Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 656 N.E.2d 51 (1st Dist. 1995); State of Illinois v. Community Landfill Co., Inc., PCB 97-193 (Oct. 3, 2002); County of Sangamon v. Daily, AC 01-16, AC 01-17 (Jan. 10, 2002); People v. D'Angelo Enterprises, Inc., PCB 97-66 (Nov. 19, 1998).

The Board finds, and Kamarasy does not dispute, that he brought abandoned mobile home materials to the Makanda site and piled them there. Quoting from the statutory definition of "general construction or demolition debris" under the Act, the Board finds that these materials at the Makanda site resulted from the "demolition" of "structures," and included "wood" and "metals." The Act does not define "demolition," but the Board looked to the definition of the word from the *American Heritage Dictionary, Second College Edition* (1991) in IEPA v. Brown, AC 04-82 (May 19, 2005), which includes the "act or process of destroying." Kamarasy destroyed mobile homes, reducing them to the large pile of pieces observed by Terry on March 25, 2004.

The Board finds that the wood and metal from the dismantled mobile homes meet the plain meaning of the Act's definition of "general construction or demolition debris," and therefore that Kamarasy's open dumping of waste resulted in the deposition of such debris at the Makanda site, in violation of Section 21(p)(7) of the Act.

"Uncontrollable Circumstances" and Section 31 Pre-Enforcement

In an administrative citation, a violation will be excused if it resulted from "uncontrollable circumstances." 415 ILCS 5/31.1(d)(2) (2002); *see also* 35 Ill. Adm. Code 108.500(b). Section 31.1(d)(2) provides:

> [I]f the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty. 415 ILCS 5/31.1(d)(2) (2002).

Kamarasy argues that the County gave him until February 13, 2004, to remove all of the debris from the Makanda site, but he could not meet that deadline because of "uncontrollable circumstances." 04-63 Memo at 26-27. According to Kamarasy, the "weather was just not cold enough and the ground was too wet and muddy" to allow heavy equipment access by February 13, 2004. *Id*. at 8. Kamarasy contends that:

> [B]oth he and the County were bound to honor this agreement [to remove all debris by February 13, 2004], that he intended to honor it, and that he made all reasonable efforts to comply with its terms. However, he was prevented from fully complying due to circumstances outside of his reasonable control. *Id*. at 9.

Kamarasy argues that he was proceeding diligently with the clean up. He states that during his January 15, 2004 phone call with Terry, Kamarasy agreed to meet the February 13, 2004 deadline. Kamarasy maintains that before he made that agreement, he had arranged with McMurphy to haul the non-recyclables to a landfill. 04-63 Memo at 27, 31. Kamarasy admits that he "did not account for the weather," and with no "solid freeze" before March 25, 2004, Kamarasy was "forced to wait until the ground dried up later in the spring." *Id*. at 27, citing IEPA v. Pekarsky, AC 01-37 (Feb. 27, 2002). Kamarasy also emphasizes that before the administrative citation issued, the County did not contact him after their January communications "to determine why more of the pile had not been removed." *Id*. at 9.

After questioning whether there was any legal "agreement" between Kamarasy and the County, the County states that Kamarasy did not fulfill his promise to clean up by February 13, 2004, anyway. County Br. at 6. Moreover, according to the County, "this Board has repeatedly held that clean up efforts are not a mitigating factor under the administrative citation program." *Id*. The County also argues that "bad weather is not an uncontrollable circumstance in this instance," noting that "winter in these climes usually contains inclement weather which would hamper anyone doing any kind of work outdoors." County Reply at 2. The County concludes

that Kamarasy "knew, or should have known, that he would most likely encounter bad weather that might hamper his ability to remove [the debris]." *Id.* at 2-3.

In relying upon the Board's decision in Pekarsky, Kamarasy has failed to cite to the case's subsequent history. In Pekarsky, the Board did find that extreme winter weather prevented compliance with a cleanup deadline that was given following a site inspection that revealed open dumping. The Board held that the weather constituted uncontrollable circumstances, rendering the administrative citation improperly issued. The Board's decision in Pekarsky, however, was overturned on the merits by the Appellate Court in an unpublished order. IEPA v. Pekarsky and PCB, No. 2-02-0281 (2d Dist., Mar. 18, 2003) (Rule 23 Order).

A plain reading of Section 31.1(d)(2) reveals that this defense is available only where the *violation* resulted from uncontrollable circumstances. *See* Brown, AC 04-82. The violations alleged and found here are based on the pile of waste that (1) Kamarasy open dumped at the Makanda site; and (2) the County observed on March 25, 2004. The violations existed when the County observed them on that date. On this record, any delay in *removing* the waste pile due to wet weather is irrelevant to the statutory defense of "uncontrollable circumstances." Even if weather delayed Kamarasy's cleanup, it did not *cause* the violation of Sections 21(p)(1) and (p)(7) of the Act. The Board therefore finds that Kamarasy has not proven the violations resulted from "uncontrollable circumstances."

In addition to the administrative citation process, the pre-enforcement process under Section 31 of the Act (415 ILCS 5/31 (2002)) came into play in this case. Section 31 of the Act sets forth a process of notice of alleged violations from the Agency and an option of meeting with the Agency to give a potential violator the opportunity to resolve alleged violations without being subject to a formal enforcement action. *See* 415 ILCS 5/31(a), (b) (2002). The potential violator may propose a "Compliance Commitment Agreement that includes specified times for achieving each commitment." 415 ILCS 5/31(a)(2)(B) (2002). The pre-enforcement process is a precondition to the Agency referring unresolved alleged violations to the Attorney General's Office or the State's Attorney for the filing of a formal complaint. *See* 415 ILCS 5/31(b) (2002).

The Board has held that, depending on case-specific circumstances, an administrative citation may be dismissed as improperly issued to a person who was voluntarily cleaning up under the Section 31 pre-enforcement process. A decision often cited for this proposition is IEPA v. Wright, AC 89-227 (Aug. 30, 1990). Because the particular facts are especially critical to this analysis, the Board will discuss the facts of Wright in detail.

In Wright, there was an initial site inspection by the Agency on August 31, 1989, during which an Agency representative gave Wright 30 days to clean up. *See* Wright, AC 89-227, slip op. at 4. According to Wright's testimony, the Agency inspector stated "that if I did not comply with getting these items corrected I would be subject to a $500 fine from IEPA. He stated that I had 30 days to get this work done." *Id.* Wright cleaned up the site within 30 days. *Id.* at 4-5.

On September 25, 1989, Wright received a letter from the Agency informing him that his noncompliance might result in enforcement, such as by enforcement action or administrative citation before the Board. *See* Wright, AC 89-227, slip op. at 4-5. Wright responded on

September 25, 1989, in writing to the Agency, explaining that the site had been cleaned up (*i.e.*, within 30 days of the first inspection). *Id*. at 5. Around the first of October, the same Agency inspector returned for a follow-up inspection when he informed Wright that "there would be no problem with an IEPA fine." *Id*. On October 21, 1989, Wright received an administrative citation. *Id*.

Under those circumstances, the Board held that the administrative citation was improperly issued:

> Mr. Wright was clearly led to believe that the matter would be closed if he cleaned up the site within 30 days. However, the administrative citation was issued . . . despite the fact that the Agency had proceeded under the pre-enforcement track and the site was cleaned up. The Board believes that in this instance the administrative citation was improperly issued. Wright, AC 89-227, slip op. at 5.

The Board finds, however, that Wright is distinguishable from Kamarasy's case. Unlike Wright, Kamarasy did not complete his cleanup within the time period specified by the County. Wright does not stand for the broad proposition that an administrative citation cannot be issued to a person merely because that person cooperates with the Agency or County and voluntarily cleans up: "The Act, by its terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans-up the site and the Board does not find differently today." Wright, AC 89-227, slip op. at 7.

The Board in Wright foresaw circumstances like those present in the Kamarasy case:

> The Board does not view today's decision as limiting the Agency's ability to utilize the administrative citation process. If an inspector determines that a site is in violation the Agency may promptly issue an administrative citation. Alternatively, the Agency may give a person time to clean up the site with the decision to give time being binding upon the Agency during the specified time. If upon reinspection the site is still thought to be in violation an administrative citation could properly issue based upon the reinspection. Wright, AC 89-227, slip op. at 7 (emphasis added).

Here, the County chose not to issue an administrative citation based on Terry's December 5, 2003 inspection of the Makanda site. Instead, the County gave Kamarasy until February 13, 2004, to clean up the debris pile. The County re-inspected on March 25, 2004, observed the alleged violation, and issued the administrative citation. Contrary to Kamarasy's suggestion, the County was in no way required under the Act to contact him to see how his cleanup was progressing. In fact, Kamarasy offered no evidence that he sought to contact Terry to explain the delay, and it was over a month after the February 13, 2004 deadline when Terry re-inspected the Makanda site. Moreover, nothing in Section 31 of the Act requires that a potential violator be given an extension of a cleanup deadline. *See* IEPA v. Carrico, AC 04-27 (Sept. 2, 2004). The Board finds nothing inappropriate about the use of the Section 31 pre-enforcement process before issuing the administrative citation in this case.

Finally, Section 31.1(a) of the Act provides that the prohibitions of Sections 21(o) and (p) "shall be enforceable either by administrative citation under this Section or as otherwise provided by this Act." 415 ILCS 5/31.1(a) (2002). The Board in Wright interpreted this provision of the Act:

> [T]he Act allows the Agency to use either the administrative citation or formal enforcement proceedings. A plain reading of the statute indicates that the General Assembly did not intend that a citizen would be charged for the same violation under both the administrative citation provisions and the formal enforcement provisions of the Act for a specific violation on a given day. Wright, AC 89-227, slip op. at 5-6 (emphasis in original).

No formal complaint was filed against Kamarasy alleging a violation of Sections 21(p)(1) and (p)(7) of the Act based on the March 25, 2004 site conditions that led to the administrative citation. The Board finds that nothing in this record runs afoul of Section 31.1(a) of the Act.

Summary of Violations at the Makanda Site

For AC 04-63, having found that Kamarasy caused or allowed the open dumping of waste resulting in litter and the deposition of general construction or demolition debris at the Makanda site, the Board finds that Kamarasy violated Sections 21(p)(1) and (p)(7) of the Act. The Board further finds that Kamarasy has failed to establish uncontrollable circumstances or any other of his purported defenses.

AC 04-64: Carbondale Site

Kamarasy denies all three alleged violations at the Carbondale site: Sections 21(p)(1), (p)(3), and (p)(7) of the Act. 04-64 Pet. at 2-3; 04-64 Memo at 1. As with the Makanda site, Kamarasy claims numerous defenses, each of which the Board addresses below.

Fourth Amendment Right to Privacy

Kamarasy first notes that the County's inspection authority under Section 4(d) of the Act (415 ILCS 5/4(d) (2002)) is subject to "constitutional limitations." 04-64 Memo at 6. Kamarasy then argues that the County exceeded those limits when Terry entered his land for the March 11 and 25, 2004 inspections without first obtaining Kamarasy's permission or a search warrant. Kamarasy maintains that this violated his right to privacy under the Fourth Amendment of the Constitution of the United States. *Id.* at 6-7.

Section 4(d) of the Act reads in part:

> In 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 the Act . . . . 415 ILCS 5/4(d)(1) (2002).

The Fourth Amendment of the U.S. Constitution provides:

> 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. U.S. Const., 4th Amend.

According to Kamarasy, the debris pile was *not* visible from a public road or neighboring property. Kamarasy states that Terry had to traverse 500 feet across Kamarasy's property to reach the debris pile. The alleged violation was not in "open or plain view" and therefore the County was required to get a warrant to enter and "search" Kamarasy's property, argues Kamarasy. 04-64 Memo at 7. Under these circumstances, Kamarasy maintains, "the evidence obtained from the warrantless searches should not be allowed." *Id.* at 7-8.

The County argues that there was no illegal search and that Kamarasy has not met his "burden of persuasion with this defense." County Br. at 9. The County notes that Terry "testified he could see the pile from the public road with the naked eye." *Id.* at 9. The County further notes that in Miller, an inspector went onto a respondent's land after noticing a potential violation from a road, and the court "found nothing wrong with this search." *Id.* The County adds that "the inspector as the agent of the Illinois Environmental Protection Agency has broad authorities under the Act to inspect and investigate violations." *Id.*

The Board agrees with the County. The Appellate Court in Miller addressed this argument under analogous facts:

> Wood's observation of the litter on Miller's property from the road and his later entry upon the property to photograph the litter did not constitute an unreasonable search.
>
> Wood observed the litter on Miller's property from the road. This was not a search because no justified expectation of privacy is present when the incriminating objects or activities are readily noticeable to persons on neighboring lands. [citation omitted] Wood then entered the land to photograph the litter. Entry upon land to photograph conditions visible from neighboring property is not an unreasonable search and seizure. Miller, 267 Ill. App. 3d at 169, 642 N.E.2d at 483.

Kamarasy "has the burden of establishing there was a search and the search was illegal." Miller, 267 Ill. App. 3d at 169, 642 N.E.2d at 483. Kamarasy did nothing more than offer his own testimony contradictory to that of Terry as to whether the debris pile was visible from the road. The Board finds that Kamarasy has not met his burden. Terry's inspections did not constitute an unreasonable search and seizure in violation of the Fourth Amendment of the U.S.

Constitution. The Board accordingly declines to suppress the evidence based on Terry's inspections of the Carbondale site.

<u>"Open Dumping" of "Waste"</u>

To prove a violation of Section 21(p)(1), (p)(3), or (p)(7), the County must first prove a violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2002)). As discussed, Section 21(a) provides that "[n]o person shall: Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2002). The definitions of "open dumping," "refuse," and "waste" are set forth above in the Board's discussion of the Makanda site.

The Board need not repeat Kamarasy's legal arguments, discussed and rejected above, that an "open dumping" violation requires a showing that the waste is leaching or emitting pollutants into the environment, or that he is not liable because he did not intend to violate the Act. Kamarasy makes the same arguments for the Carbondale site (04-64 Memo at 8-13, 24-25; 04-64 Resp. Br. at 4, 6-7), and the Board finds them no more persuasive here. Kamarasy also argues, without citation to authority, and without merit, that the debris pile should be exempt because of its allegedly small or "*de minimus*" size. 04-64 Resp. Br. at 9, 12.

The record shows that on March 25, 2004, Terry observed roughly 10 cubic yards of debris on the ground at the Carbondale site, including ash, landscaping waste, dimensional lumber, metal frames, posts, and cans, a metal piece of sink, and sections of laminate counter tops. Kamarasy concedes that he consolidated the materials from his neighboring home and his farm activities and placed the materials into a pile to burn them. The Board finds that under these circumstances, the materials were "discarded" and therefore constitute "waste" under the Act. Further, it is undisputed that the Carbondale site does not meet the requirements for a sanitary landfill. The Board accordingly finds that Kamarasy "open dumped" waste at the Carbondale site.

<u>Resulting in "Litter"</u>

As discussed, the Board has adopted the definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See* <u>Mund</u>, AC 90-64, slip op. at 4, 6. The definition of "litter" in the Litter Control Act is set forth above in the discussion of the Makanda site.

Again, the Board need not repeat Kamarasy's legal arguments premised on the Litter Control Act, all of which were discussed and rejected above. Kamarasy repeats the arguments for the Carbondale site (04-64 Memo at 13-18, 24-26; 04-64 Resp. Br. at 7-8), and the Board finds them equally unconvincing in this case. The Board finds that the pile of materials at the Carbondale site, including wood and metals, were discarded substances, and as such fall within the definition of "litter." The Board accordingly finds that Kamarasy violated Section 21(p)(3) of the Act by causing or allowing the open dumping of waste, resulting in "litter."

Resulting in "Open Burning"

"Open burning" is defined in the Act as "the combustion of any matter in the open or in an open dump." 415 ILCS 5/3.300 (2002). Kamarasy argues that his burn pile was exempt under the Part 237 open burning regulations of the Board (35 Ill. Adm. Code 237). 04-64 Memo at 18-19. Section 237.120 of those regulations includes several exemptions under which the open burning of "agricultural waste," "domicile waste," and "landscape waste" is exempt under specified conditions.[8] *See* 35 Ill. Adm. Code 237.120(a)-(c). Each of these terms is defined in the regulations. *See* 35 Ill. Adm. Code 237.101. The County argues that Part 237 provides no "defense or limitation to a Section 21(p) administrative citation brought under Section 31.1 of the Act." County Br. at 10-11.

There is no need here to address the many particulars of these exemptions in great detail. Kamarasy fails for any of several reasons. First, the regulations do not purport to provide an exemption from liability for a violation of Section 21(p)(3) of the Act, the statutory provision at issue for Kamarasy. Section 237.120, by its own terms, provides an exemption *only* from the prohibitions of Section 9(c) of the Act and Part 237. *See* 35 Ill. Adm. Code 237.120. Second, each of the mentioned Part 237 exemptions is limited to open burning that waste "[o]n the premises on which such waste is generated." *See* 35 Ill. Adm. Code 237.120(a)(1), (b)(1), (c)(1). Even if the materials from Kamarasy's home qualified as "domicile waste" under the regulations, Kamarasy concedes that his home is not on the Carbondale site. Finally, "domicile waste" is defined as "[a]ny refuse generated on single-family domiciliary property as a result of domiciliary activities." 35 Ill. Adm. Code 237.101. The Board finds that various material in the burn pile, such as the laminate counter tops, do not come within this definition. *See* IEPA v. Grubaugh, AC 92-3 (Oct. 16, 1992) (similar material in burn pile "clearly goes beyond mere domicile waste").

Kamarasy concedes that he burned debris in the pile and the photographic evidence shows ash and charred metals, counter tops, and dimensional lumber. The Board finds that Kamarasy's open dumping of waste resulted in "open burning" in violation of Section 21(p)(3) of the Act.

Resulting in the Deposition of "General Construction or Demolition Debris"

The statutory definition of "general construction or demolition debris" as used in Section 21(p)(7) of the Act is set forth above in the discussion of the Makanda site. The Board need not repeat Kamarasy's legal arguments, discussed and rejected above, that he cannot be charged with more than one violation of the Act for the same act of open dumping. Kamarasy makes those arguments again, but for the Carbondale site (04-64 Memo at 27-28), and the Board finds them no more convincing here.

Kamarasy also denies that the burn pile contained "general construction or demolition debris" because he "was not constructing a structure, nor was he demolishing one." 04-64 Memo at 20; 04-64 Resp. Br. at 9. The County responds that the "facts in evidence clearly belie

[8] *But see* 415 ILCS 5/9 (2002) on limits to prohibitions on landscape waste burning.

this argument," pointing to the dimensional lumber and counter tops in the pile on March 25, 2004. County Br. at 11.

The Board notes, and Kamarasy concedes, that dimensional lumber, metal fence posts, and counter tops in the burn pile came from his home on the adjacent site and from the Carbondale site's farm operations. In his response brief, Kamarasy repeats that "no construction or demolition activities were shown, " but then adds "except for the replacement of old fence posts." 04-64 Resp. Br. at 9. The Board finds that the preponderance of the evidence in the record demonstrates that at least some materials in the pile resulted "from the construction, remodeling, repair, [or] demolition of . . . structures," and as such fall within the Act's definition of "general construction or demolition debris."

To prove this alleged Section 21(p)(7) violation, the County is not required to establish that *every* item in the debris pile constitutes "general construction or demolition debris," but rather only that such material was in fact deposited. *See* Carrico, AC 04-27; Daily, AC 01-16, AC 01-17. Nor is the County required to observe Kamarasy in the act of constructing, remodeling, repairing, or demolishing. *See* IEPA v. Thomas, AC 89-215 (Jan. 23, 1992). The County has met its burden. The Board therefore finds that Kamarasy's open dumping of waste resulted in the deposition of "general construction or demolition debris" at the Carbondale site, in violation of Section 21(p)(7) of the Act.

Summary of Violations at the Carbondale Site

For AC 04-64, the Board finds Kamarasy caused or allowed the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris at the Carbondale site, violating Sections 21(p)(1), (p)(3), and (p)(7) of the Act. The Board further finds that Kamarasy failed to prove that the administrative citation was improperly issued.

Civil Penalty and Hearing Costs

The County seeks the statutory $1,500 civil penalty for each of the five violations (two at the Makanda site for $3,000, three at the Carbondale site for $4,500), for a total civil penalty of $7,500. AC 04-63 at 2; AC 04-64 at 2. Because the parties have been to hearing and the Board has found that Kamarasy violated Sections 21(p)(1) and (p)(7) at the Makanda site, and Sections 21(p)(1), (p)(3), and (p)(7) at the Carbondale site, the Board now addresses the issues of civil penalty 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 Agency, except that the civil penalty amount shall be $3,000 for each violation of any provision of subsection (p) of Section 21 that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2002).

When the Board finds a violation in a formal enforcement action brought under Section 31 of the Act, the Board has the discretion to impose a penalty and if the Board decides to impose one, the Board may consider factors that mitigate the amount of penalty. *See* 415 ILCS 5/31, 33(c), 42(h) (2002). The Board has no such discretion after finding a violation in an administrative citation action. *See* Miller, 267 Ill. App. 3d at 167, 642 N.E.2d at 482. The Board must impose a civil penalty on Kamarasy and, further, the amount of that penalty is fixed by the Act.

There is no indication that this is a second or subsequent adjudicated violation for Kamarasy. *See* Yocum, AC 01-29, AC 01-30 (cons.) (Aug. 8, 2002) (violations of Sections 21(p)(1) and (p)(7) found at each of two sites in consolidated administrative citation order of June 6, 2002, constitute initial violations). Therefore, the civil penalty for Kamarasy's first violations of Sections 21(p)(1), (p)(3), and (p)(7) is statutorily set at $1,500 for each of the five violations, totaling $7,500. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the $7,500 penalty in its final opinion and order.

In addition, by unsuccessfully contesting the administrative citations at hearing, Kamarasy must pay the hearing costs of the County and the Board. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500(b)(3). However, no information on those costs is in the record. The County and the Clerk of the Board are therefore each ordered to file a statement of costs, supported by affidavit, and to serve the filing on Kamarasy. Kamarasy will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that Kamarasy violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing the open dumping of waste resulting in litter and the deposition of general construction or demolition debris at the Makanda site. The Board also finds that Kamarasy violated Sections 21(p)(1), (p)(3), and (p)(7) of the Act by causing or allowing the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris at the Carbondale site.

Having found the violations in these administrative citation actions, Kamarasy must pay a civil penalty of $7,500 and the hearing costs of the County and the Board. As set forth in the order below, the Board directs the County and the Clerk of the Board to file hearing cost documentation, to which Kamarasy 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 Kamarasy and assessing against him any appropriate hearing costs.

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

ORDER

1. Kamarasy violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2002)) at the Makanda site.

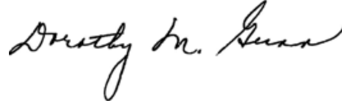
2. Kamarasy violated Sections 21(p)(1), (p)(3), and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(3), (p)(7) (2002)) at the Carbondale site.

3. By July 6, 2005, the County must file a statement of its hearing costs, supported by affidavit, with service on Kamarasy. By July 6, 2005, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit, with service on Kamarasy.

4. By July 26, 2005, Kamarasy may file a response with the Board to the filings required in paragraph 3 of this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on June 16, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board