

ILLINOIS POLLUTION CONTROL BOARD
February 7, 2002

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| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | AC 01-37 |
| |) | (IEPA No. 141-01-AC) |
| MARSHALL PEKARSKY, |) | (Administrative Citation) |
| |) | |
| Respondent. |) | |

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

PETER ALEXANDER APPEARED ON BEHALF OF MARSHALL PEKARSKY.

OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

On April 16, 2001, pursuant to Section 31.1(b) of the Environmental Protection Act (Act) (415 ILCS 31.1(b) (2000)), the Illinois Environmental Protection Agency (Agency) filed with the Board an administrative citation to Kishwaukee Auto Parts, which is located in Rockford, Winnebago County. The administrative citation, based on a March 7, 2001 inspection, alleges that the respondent caused or allowed the open dumping of waste in a manner that resulted in litter. These activities were in alleged violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). On May 18, 2001, respondent filed a petition for review of the administrative citation pursuant to Section 31.1(d) of the Act (415 ILCS 31.1(d) (2000)), denying that it was operating an open dump. The Board finds that respondent allowed open dumping that resulted in litter under 415 ILCS 5/21(p)(1). However, the Board does not find that respondent is in violation of the Act because "uncontrollable circumstances" created by extreme weather prevented him from cleaning up the site within the 90-day grace period specified in the Agency's administrative citation warning notice (ACWN). *See* 415 ILCS 5/31.1(d)(2) (2000).

PRELIMINARY MATTERS

Complainant moved at the hearing on October 29, 2001, that the name of the respondent be changed from Kishwaukee Auto Parts to Mr. Marshall Pekarsky, who is a co-executor of the estate that owns the site, as well as the current operator of Kishwaukee Auto Parts. Tr. at 34, 45. Mr. Pekarsky has held this position since the death of his father, Abe Pekarsky, in November 1995. Complainant stated at hearing that Kishwaukee Auto Parts is a non-entity. Complainant further alleged that Mr. Pekarsky was appropriately served and notified of this matter. Tr. at 49. Mr. Pekarsky testified at hearing on this matter, and had no objection to the motion. Comp. Br. at 2; Tr. at 49. The hearing officer granted the motion. Tr. at 50. The above caption reflects that Mr. Pekarsky is the appropriate respondent in this matter.

BACKGROUND

At the October 18, 2001 hearing on this matter, Mr. Kaare Jacobsen, Agency inspector, testified concerning the nature of Kishwaukee Auto Parts, and his inspections of the site. Mr. Jacobsen stated that the site at issue is a salvage yard, where automobiles are scrapped for parts to be sold to auto stores. Tr. at 11. The site is located at 601 Harrison Avenue, Rockford, Winnebago County. Adm. Cit. at 1.¹

Mr. Jacobsen testified that he first conducted a tire inspection at the site on October 19, 2000, where he saw municipal waste, landscape waste, recyclable material, and soil saturated with oil. Tr. at 11-12. As a result of the inspection, the Agency sent the respondent an ACWN, giving him 90 days, or until February 20, 2001, to clean up the site. Tr. at 20-22. The ACWN specifically states that the respondent “may be subject to substantial civil penalties if [he] fail[s] to comply with the terms of this [ACWN], and are found to be in violation of the [Act].” ACWN at 1.² Mr. Jacobsen testified that he estimated it would take 45 days to dispose of the waste at the site. Tr. at 23.

Mr. Jacobsen testified that he conducted a follow-up visit on February 21, 2001, which was the original date by which he alleged the respondent was supposed to have cleaned up the site. Tr. at 13. Although Mr. Jacobsen stated 90% of the waste that he previously saw on the site was disposed of, there were remains of solid waste still on the site. Tr. at 14-15. Mr. Jacobsen stated that snow obscured his view of the progress of the site cleanup on that date. Tr. at 26. However, he alleged that he saw waste, including a refrigerator, tire, recyclable metal, remains from a huge waste pile, as well as landscape waste. Tr. at 15.

Mr. Jacobsen stated at hearing that he returned to the site on March 7, 2001, when he could more clearly see oil-saturated soil, landscape waste, building material, municipal waste, and other waste in piles on the site. Tr. at 16-17. Specifically, Mr. Jacobsen testified that he saw sheet metal, wooden two-by-fours, a large cooler or heater, landscape waste mixed with building material and metal parts, used pallets, and inserts from grease guns. Tr. at 17-18. Mr. Jacobsen testified that he did not see any new refuse in his February and March, 2001 inspections. Tr. at 25. He noted on his inspection checklist that respondent was allegedly in violation of Sections 21(a), 21(d)(1) and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(d)(1), 21(p)(1) (2000)), and 35 Ill. Adm. Code 812.101(a). Tr. at 19.

When questioned by counsel for the respondent, Mr. Jacobsen testified that it snowed three weeks after he issued the ACWN, in the first week of December. Tr. at 26. Mr. Jacobsen stated that he could not decipher what was on the site because of snow coverage. Tr. at 26. He testified that the snow made it difficult to see what respondent had cleaned up on the site. Tr. at 13. Mr. Jacobsen also testified that the condition of the site looked like a long-standing problem.

¹ On April 16, 2001, the Agency filed an administrative citation against Kishwaukee Auto Parts, which is referred to as “Adm. Cit. at ____.”

² The Agency issued an Administrative Citation Warning Notice to Kishwaukee Auto Parts on November 22, 2000, which is referred to as “ACWN at ____.”

Tr. at 30. When asked whether he could identify any waste that was younger than 15 years old, Mr. Jacobsen stated that the landscape waste might qualify as newer waste. Tr. at 31. Mr. Jacobsen indicated that he did speak with Mr. Pekarsky about problems that he was having in cleaning up the site. Tr. at 28.

At hearing, Mr. Pekarsky testified that the estate of Abe Pekarsky, his late father, currently owns the site of Kishwaukee Auto Parts. Tr. at 33. Mr. Abe Pekarsky passed away on November 19, 1995. Tr. at 33-34. Prior to 1995, Mr. Marshall Pekarsky testified that he neither had control over, nor allowed any refuse to be dumped at the site. Tr. at 34. When Mr. Abe Pekarsky died, Mr. Marshall Pekarsky became co-executor of his estate, and took over the operation of Kishwaukee Auto Parts. Tr. at 34.

Mr. Pekarsky still operates Kishwaukee Auto Parts at the site, where he recycles car parts. Tr. at 34. Prior to his father's death, he worked in the store for the business. Pekarsky stated that the yard was a separate part of the business. The store catalogues car parts, and the yard distributes available parts to consumers. Tr. at 41-42.

Mr. Pekarsky testified that the site was frozen from a week after Mr. Jacobsen's first visit in November 11, 2000 [sic] through the first days of March 2001. Tr. at 35. Mr. Pekarsky stated that he had to stop his remediation efforts largely because of the weather. Tr. at 39. He testified that he could not continue to remediate the site because of the three-month freeze. Tr. at 39. He also stated that he "couldn't send guys out to freeze themselves with any of the other piles," which he has since removed. Tr. 36. Despite the freeze, Mr. Pekarsky said at hearing that he removed the majority of a pile of rubbish, measuring 15 feet in height and depth by February 21, 2001. Tr. at 35. Mr. Pekarsky also testified that the estate is insolvent, and that he owes \$36,000 in real estate taxes for the site, which he could not afford. Tr. at 36. Due to the cost and weather conditions, Mr. Pekarsky stated at hearing that he was unable to clean up the site by February 21, 2001.

As of the October 29, 2001 hearing, Mr. Pekarsky alleges that he continues to remediate the site. Tr. at 43. He testified that he obtained a larger dumpster to fill with regular waste from his business and the waste remaining on the property, and hired someone to pick up waste and loose tires dispersed around the yard. Tr. at 38. Mr. Pekarsky states that he finished approximately 95% of the cleanup by the date of the hearing. Tr. at 43.

ARGUMENTS

The Board summarizes the arguments raised by the parties in the section below. The arguments mainly center on two issues: (1) whether respondent allowed the open dumping of waste; and (2) whether the Agency was estopped from bringing a citation against the respondent in that the violation resulted from "uncontrollable circumstances" within the meaning of Section 31.1(d)(2) of the Act (415 ILCS 5/31.1(d)(2) (2000).

Complainant

Complainant states that it proved that Mr. Pekarsky allowed open dumping on the site. Comp. Mot. at 2. Complainant points to the fact that Mr. Pekarsky is the co-executor of his father's estate since 1995, which includes the site. *Id.* Mr. Pekarsky has operated Kishwaukee Auto Parts since his father's death, and had control of the site at the time of the inspection on March 7, 2001. *Id.* Prior to becoming co-executor of the estate, Mr. Pekarsky worked at the counter of the store at the site, and advised whether employees should buy or sell automobiles. *Id.*

Complainant argues that Mr. Pekarsky is liable under the Act even if he did not actively allow the waste to accumulate on the property because "present inaction on the part of the landowner to remedy the disposal of waste that was previously placed on the site, constitutes "allowing" litter in that the owner allows the illegal situation to continue." Comp. Br. at 3, citing IEPA v. Rawe, AC 92-5, slip op. at 6 (Oct. 16, 1992) [sic]. Even though Mr. Pekarsky does not hold legal title to the site, complainant states that he is in control over the operation of Kishwaukee Auto Parts and remediation efforts at the site. Comp. Br. at 3. Moreover, Mr. Pekarsky removed 95% of the waste remaining at the site by the October 18, 2001 hearing date. Complainant argues that if Mr. Pekarsky could remove 95% of the waste by this date, then he could have removed all of the waste in the five years that he controlled the site. Comp. Br. at 3.

Respondent

Respondent argues that complainant failed to prove that Mr. Pekarsky allowed any waste or litter to accumulate at the site. Tr. at 46. Respondent states that the litter resulted from uncontrollable circumstances, in that respondent had no control over the past dumping of waste at the site prior to when he became executor of his father's estate. *See* 415 ILCS 5/31.1(d)(2) (2000). Respondent alleges that he had no control over his appointment as executor of his father's estate. Resp. Br. at 4. Respondent also argues that there is no evidence that new trash or refuse was deposited on the site prior to 1985. Resp. Br. at 3. Respondent points to testimony by Mr. Jacobsen that the refuse could have been 10 to 15 years old, and that he could not identify new waste deposited on the site since the 1980's. Resp. Br. at 3, citing Tr. at 26. Consequently, respondent argues that complainant charged the wrong entity with violations of the Act.

Respondent contends that complainant's reliance on Rawe, AC 92-5, slip op. at 6, is misplaced. Respondent argues that the "Board legislated the words 'allowed to remain' into Section 5/21(p)[, and that c]learly had the legislature intended this, it would have so stated in the statute." Resp. Br. at 5. Respondent states that the Act is quasi-criminal in nature because it allows for the imposition of substantial fines and penalties. As a result, respondent argues that the Act should therefore be strictly interpreted. *Id.* Respondent contrasts Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)) with the Litter Control Act (415 ILCS 105/1 et seq. (2000)), which mentions the "leaving of litter." *Id.* Respondent states that the exclusion of such language in Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)) shows the legislative decision not to extend it to such circumstances. *Id.*

Respondent further distinguishes Rawe from this case in that the Rawes owned the property where the litter remained. Resp. Br. at 5. Respondent argues that Mr. "Pekarsky did

not create the litter, does not own the land on which the litter already existed, and was unwillingly appointed co-executor of the totally insolvent estate.” Resp. Br. at 5.

Respondent also contends that Mr. Pekarsky did not have a full 90 days from the date of the ACWN (November 22, 2000) to the date of issuance of the citation on February 21, 2001, to remediate the site, due to extreme weather conditions. Tr. at 47. Respondent states that he could not have cleaned up the site within the given time frame because of the extent of snow and ice on the ground between December 2000 and March 2001. Despite the limitations, respondent argues that he still made an effort to remediate 90% of the waste on the site during the 90-day compliance period stated in the ACWN. Resp. Br. at 2. Respondent contended that, after decades of waste accumulation and months of extreme weather, that the 90-day window was inappropriate. Tr. at 47.

DISCUSSION

This matter involves two issues that the Board addresses below. First, the Board determines whether the respondent’s actions constitute an allowance of open dumping, in violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). Second, the Board discusses whether the Agency is estopped from bringing an administrative citation against the respondent on March 7, 2001, for violating Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). The Board specifically addresses whether the unique circumstances of the extreme weather in this case amounts to uncontrollable circumstances that prevented the respondent from having 90 usable days to clean up the site and resulted in this citation.

Allowance of Open Dumping Under Section 21(p)(1) of the Act

The first issue before the Board is whether respondent’s failure to remove waste that accumulated on the site constitutes an allowance of open dumping under Section 21(p) of the Act (415 ILCS 5/21(p) (2000)). Complainant argues that Mr. Pekarsky allowed the open dumping of waste, resulting in litter, in violation of 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). Respondent contests that he could not have allowed open dumping of waste because the waste was deposited on the site prior to when he became co-executor of the site, and operator of Kishwaukee Auto Parts in 1995.

This issue is directly addressed in County of Will v. Utilities Unlimited, Inc., AC 97-41, slip op. at 5 (July 24, 1997). In Utilities Unlimited, the Board found an agent of the utilities company to have violated Sections 21(p)(1) and (3) of the Act (415 ILCS 5/21(p)(1), (3) (2000)), when he did not clean up litter that others had deposited on the site. A person can cause or allow a violation of the Act without knowledge or intent. Utilities Unlimited, AC 97-41, slip op. at 5, citing People v. Fiorini, 143 Ill.2d 318, 574 N.E.2d 612 (1991). The Board said, in pertinent part that:

[P]resent inaction on the part of the landowner to remedy the disposal of waste previously placed on the site constitutes “allowing” litter in that the owner allows the illegal situation to continue. (citation omitted) In this case, [respondent] Petrekis admitted that “[a]s designated agent for this utility company, I’m in

charge.’ Tr. at 60-61. As such Petrekis was the operator of the site and had the ability to control the site. Utilities Unlimited, AC 97-41, slip op. at 5.

The same situation is present in this case. Since 1995, Mr. Pekarsky has been the operator of Kishwaukee Auto Parts, and co-executor of the site where the open dumping occurred. Mr. Pekarsky is the proper respondent in this matter, as agreed upon in the oral motion by complainant and respondent during the October 29, 2001 hearing. Mr. Pekarsky has control over the site, and has left the litter that had previously been dumped on the site to remain on it after he became executor of his father’s estate in 1995. Such inaction qualifies as an “allowance” under 415 ILCS 5/21(p)(1) (2000). *See also IEPA v. M.K O’Hara Construction, Inc. et al.*, AC 94-96, AC 94-97, slip op. at 6 (Apr. 6, 1995).

Promissory Estoppel.

The second issue before the Board is whether the Agency is estopped from bringing the citation for the March 7, 2001 violation because extreme winter conditions that allegedly prevented the respondent from cleaning up the site within 90 days of the ACWN, constitute a defense of “uncontrollable circumstances” under 415 ILCS 5/31.1(d)(2). The defense would exonerate respondent from liability for open dumping litter on the site, in violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). This argument can be broken down into two separate inquiries. The first is whether the respondent is entitled to the 90 days between the ACWN and the issuance of an administrative citation to clean up the site. The second is whether uncontrollable circumstances prevented the respondent from remediating the site within this timeframe.

The ACWN is not a statutory element of the administrative citation process. It is a tool used by the Agency to encourage compliance with the Act. However, the respondent properly alleges elements of promissory estoppel concerning his reliance on the 90-day period specified by the Agency in the ACWN. “The doctrine of promissory estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another.” People v. Douglas Furniture of California, PCB 97-133, slip op. at 5 (May 1, 1997), citing Browns Furniture v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). “An essential element of . . . estoppel is that in reliance on the representation of another, the party asserting the estoppel must have done or omitted some act or altered his position in such a way that he would be injured if the other person is not held to the representation on which the estoppel is predicated.” IEPA v. Piolet Brothers Trading, Inc., AC 88-51, slip op. at 9 (July 13, 1989), quoting Department of Public Works & Buildings v. Exchange National Bank, 31 Ill. App. 3d 88, 334 N.E.2d 810 (1975).

“The party who asserts estoppel must prove the requisite elements of estoppel by clear, precise, and unequivocal evidence.” Douglas Furniture, PCB 97-133, slip op. at 5 (citation omitted). The doctrine should only be invoked under compelling circumstances so as not to defeat the operation of public policy. *Id.* “A party seeking to estop the government must prove at least two elements: (1) an affirmative act on the part of the government entity, and (2) the inducement of substantial reliance by the affirmative act.” Douglas Furniture, PCB 97-133, slip

op. at 5. “[A] party seeking to estop the government must show that the affirmative act was of the public body itself, rather than the unauthorized or mistaken act of a ministerial officer.” *Id.*

The respondent’s allegations fall under this doctrine because he alleges extreme weather prevented him from using the 90 days granted by the Agency in the ACWN to clean up the site. Resp. Br. at 4, 6. The Board finds that this argument is compelling. First, the Agency practice in this specific type of administrative citation action is to customarily grant respondents time to remediate problems on a particular site. The ACWN form states in bold print on the front page that respondents “may be subject to substantial civil penalties if [they] fail to comply with the terms of this [ACWN], and are found to be in violation of the [Illinois] Environmental Protection Act.” ACWN at 1. On the same page, the ACWN stated that the respondent in this matter must “remove all waste to a permitted landfill or transfer station by February 20, 2001.” ACWN at 1.

The Agency also provided testimony that confirmed its customary usage of the 90-day remediation window. Mr. Jacobsen specifically stated that the ACWN “indicates that we will give them 90 days to complete the task that we asked them to do, if not, they would be subject to go to an [administrative citation]” Tr. at 22.

The Board notes that the final page of the ACWN contains a statement in normal print under the heading of “Potential Sanctions” that states the “Agency may, without further notice and regardless of any future activities to achieve compliance, file an Administrative Citation before the Illinois Pollution Control Board pursuant to Section 31.1 of the Act [415 ILCS 5/31.1 (1994)].” ACWN at 3. However, the Board does not find this disclaimer effective in preventing estoppel of the Agency to issue an administrative citation, in light of the overwhelming evidence that the 90-day grace period is usual and customary. Both Agency testimony and the ACWN itself represent in conspicuous language that the respondent has 90 days to clean up the site before the Agency will issue an administrative citation. The Board accordingly finds that respondent proves the element of reliance under promissory estoppel because the ACWN constitutes an affirmative act on the part of Agency that induced substantial reliance by the respondent on the standard 90-day window granted in the ACWN.

“The Board has previously held that Agency actions can lead to an improperly issued citation.” IEPA v. Southern Pacific Railroad, AC 90-59, slip op. at 4, (Mar. 28, 1991), citing IEPA v. Jack Wright, AC 89-227 (Aug. 30, 1990). In Wright, the Board found that the Agency did not properly issue the administrative citation for open dumping litter because the field inspector made assurances that the respondent would not be found in violation of the Act if he cleaned up the site within 30 days. Wright, AC 89-227, slip op. at 7.³ Similarly, the Board held in Pielet that the Agency was estopped from finding violations because it made representations to the respondent Pielet that it “could reasonably have believed allowed it to deposit waste by area fill method in certain portions of the landfill in addition to those permitted.” Pielet, AC 88-51, slip op. at 9.

³ The Board notes that the respondent in Wright did not raise the promissory estoppel argument in so many words. However, the Board found similarly that the Agency’s representations barred it from issuing an administrative citation. The Board reaches the same result in this case.

In this case, the Agency made representations to the respondent that if he cleaned up the site within 90 days, the Agency would not issue an administrative citation. The respondent detrimentally relied on the availability of the full 90 days to clean up the site.

The circumstance distinguishing and complicating this case from the usual administrative citation case before the Board is the Agency's ACWN. The violation alleged here is a violation of Section 21(p)(1) of the Act: "allow[ing] the open dumping of waste in a manner which results in any of the following occurrences at a dump site: litter." 415 ILCS 5/21(p)(1) (2000). Under the Section 31.1(b) administrative citation process (415 ILCS 5/31.1(b) (2000)), an Agency inspector can go to the site and issue an administrative citation if he sees litter on the day of the inspection. The Board then determines whether "the violation occurred" on that day, and finds a violation and assesses a penalty unless the violation on that day "resulted from uncontrollable circumstances." This process would be strictly according to statute. *See* 415 ILCS 5/31.1 (2000).

Here, the Agency's issuance of the ACWN introduced an element of confusion. The specific language of the citation directing respondent to "remove all waste . . . by February 20, 2001" (ACWN at 1), arguably changes the focus of the Section 31.1(b) inquiry from whether litter was present on the site on a specific day, to whether a full cleanup was completed during the grace period. The question becomes not whether uncontrollable circumstances caused the presence of litter on the inspection date, but whether respondent's failure to complete its removal of pre-existing litter within the ACWN's stated time period was the result of uncontrollable circumstances.

The respondent proves that, in reality, he did not have 90 days from the date of the ACWN to remediate the site. Respondent alleges that extreme winter weather created an uncontrollable circumstance, pursuant to Section 31.1(d)(2) of the Act (415 ILCS 5/31.1(d)(2) (2000)) that prevented him from cleaning up the site prior to the Agency inspections on February 21, 2001 and March 7, 2001. Section 31.1(d)(2) of the Act states in part that:

If 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) (2000).

The respondent alleges that the winter storm in December 2000 and extreme conditions of ice and snow until March, 2001 created uncontrollable circumstances under Section 31.1(d)(2) of the Act (415 ILCS 5/31.1(d)(2) (2000)). Specifically, the respondent points to testimony by Mr. Jacobsen, stating that he could not decipher what was on the site during his February 21, 2001 visit, due to the snow coverage. Tr. at 26. The respondent further alleges that the ground froze in the first week of December, three weeks after Mr. Jacobsen's initial visit, and did not thaw until early March 2001. *See* Tr. at 26, 35.

The respondent states that, despite the frozen ground, he still was able to remove 90% of the waste on the site by February 20, 2001. Tr. at 36. Respondent stated that he began to prepare to remove more of the waste, but could not continue because of the freeze. Tr. at 39. He

contends that he did not have the time to finish cleaning up the site, and could not send workers out to freeze in an effort to handle any more of the waste. Tr. at 36.

The complainant did not refute the respondent's allegations of extreme weather. In fact, Mr. Jacobsen agreed that the ground froze in early December, three weeks after his initial visit. Mr. Jacobsen stated that he estimated the respondent needed 45 days from the ACWN to remediate the site. Tr. at 23. When Mr. Jacobsen testified about his visit on February 21, 2001, he stated that the snow still covered the site, and that you could hardly tell what waste was left on the site because of the snow. Tr. at 15, 22. He stated that he "went out there and there was snow cover on the ground, which was hard to realize what was done or not." Tr. at 13.

Complainant's argument focuses instead on the fact that respondent had since 1995 to clean up the litter from the site. Complainant states that if the respondent can clean up 95% of the waste on the site in seven months, then it surely could have cleaned up all of it within the five years that he had control over the site. Pet. Br. at 3. This argument does not address the issue of whether the respondent was given the full 90-day period to remediate the site, in accordance with the ACWN.

The Board previously held that an owner and operator of a landfill that violated Section 21(p)(12) of the Act (415 ILCS 5/21(p)(12) (1988)), demonstrated that the violations resulted from uncontrollable circumstances. St. Clair County v. J & R Landfill, Inc., AC 89-18, slip op. at 11 (May 10, 1990). This case differed from others where the Board found weather did not provide a defense under Section 31.1(d)(2) of the Act in that J & R landfill provided unrefuted testimony that the ground at the landfill was unworkable. *Id.* In cases where Section 31.1(d)(2) did not afford respondents a defense from violations of the Act, the Board found that either the weather did not bar cleaning up the site, or that the circumstances that impeded remediation efforts were foreseeable. *See County of Ogle v. Rochelle Disposal Service*, AC 92-26, slip op. at 4 (May 20, 1993); County of Ogle v. Rochelle Disposal Service, AC 92-64, slip op. at 5 (Aug. 26, 1993) (citation omitted).

In this case, the Board finds that the December 2000 snowstorm, and subsequent freeze until March 2001, creates a sufficient uncontrollable circumstance to exonerate respondent from violating Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). The Board takes judicial notice that Illinois experienced record snowfall and bitter temperatures in the winter of 2000. *See Midwest Regional Climate Center* (last modified Mar. 29, 2001) <<http://mcc.sws.uiuc.edu/>>; CNN.com Weather: Record cold spell brings big freeze to Great Lakes (last modified Jan. 6, 2001) <<http://www.cnn.com/2001/WEATHER/01/06/winter/index.html>>; CNN.com Weather: Storm with blizzard-like conditions rages across U.S. Plains (last modified Jan. 30, 2001) <<http://www.cnn.com/2001/WEATHER/01/30/plains.snowstorm.02/index.html>>. According to the Midwest Regional Climate Center (MRCC), Illinois experienced its single coldest December in 106 years, and Rockford received a record snowfall of 30.1 inches in that month alone. MRCC, (last modified Mar. 29, 2001) <<http://mcc.sws.uiuc.edu/>>. The severity of the snowstorm and long freeze created a unique unforeseeable situation that barred respondent's remediation efforts. The snow coverage and ground freeze in this matter are not refuted by the complainant, whose witness testified that he could not "decipher" what was on the site during his February 21, 2001 visit because of the snow. Although the ground thawed shortly before the

Agency's return visit on March 7, 2001, the Board finds that the prior months of extreme weather did not afford the respondent the opportunity to clean up the remaining waste on the site within the ACWN's 90-day grace period.

Based on the foregoing, the Board finds that the Agency is estopped from issuing this administrative citation under the specific fact circumstances. The Agency issued an ACWN, which gave the respondent 90 days to clean up the site. The Agency inspector, Mr. Jacobsen, testified that if the site was cleaned up within this time frame, that the Agency would not issue the respondent the administrative citation. The ACWN itself stated that failure to clean up the site within the 90 days would result in an administrative citation. The respondent proved that it could not have fulfilled the terms of the 90-day remediation mandate in the ACWN due to extreme winter conditions. Without the use of the full 90 days granted by the ACWN, the respondent did not have the opportunity to complete the cleanup necessary to avoid the issuance of the administrative citation. Despite the record temperatures and snowfall that allowed in reality approximately 30 days to remediate the site, the Agency issued the respondent an administrative citation for a violation on March 7, 2001.

The Board finds that the citation that was issued on March 7, 2001, directly resulted from the respondent's failure to clean up the site in accordance with the ACWN. The uncontrollable circumstances of extreme weather was the direct cause of the resulting violation, as defined in Section 31.1(d)(2) of the Act (415 ILCS 5/31.1(d)(2) (2000)) because it deprived the respondent of utilizing the 90 days granted to him in the ACWN, and avoiding the issuance of the citation. Accordingly, the Board makes no finding of violation and imposes no penalty for the violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000)). This case is dismissed and the docket is closed.

The Board notes that the 90-day grace period provided to respondents in an ACWN is specific to the administrative citation process. This does not preclude the Agency from bringing an enforcement action under such circumstances, which is not bound by the same specific statutory and customary constraints as an action under Section 31.1 of the Act. *See* 415 ILCS 5/31.1 (2000); Wright, AC 89-227, slip op. at 5-6.

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

ORDER

The Board dismisses this administrative citation, finding that the violation resulted from "uncontrollable circumstances" within the meaning of Section 31.1(d)(2) of the Environmental Protection Act. 415 ILCS 5/31.1(d)(2) (2000). This docket is closed.

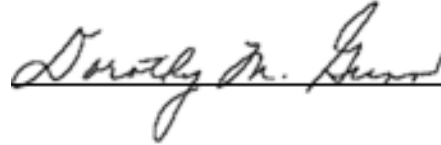
IT IS SO ORDERED.

Chairman C.A. Manning and Board Member R.C. Flemal dissented.

Section 41(a) of the Environmental Protection Act provides the 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 February 7, 2002, by a vote of 5-2.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board