

ILLINOIS POLLUTION CONTROL BOARD  
May 20, 2004

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 03-13
	)	(IEPA No. 565-02-AC)
DAN CADWALLADER,	)	(Administrative Citation)
	)	
Respondent.	)	

MICHELLE RYAN, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

JOHN GRIVETTI APPEARED ON BEHALF OF RESPONDENT.

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

Today the Board finds that respondent Dan Cadwallader violated Section 21(p)(1) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) (2002)) at a site in Granville, Putnam County, by causing or allowing the open dumping of waste resulting in litter. The violation was alleged in an administrative citation issued by the Illinois Environmental Protection Agency (Agency). As described below, Mr. Cadwallader is therefore subject to a statutorily mandated \$1,500 civil penalty, and must pay the hearing costs of the Agency and the Board.

After finding the violation in this interim opinion and order, the Board directs the Agency and the Clerk of the Board to provide hearing cost documentation, to which Mr. Cadwallader 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.

In this interim opinion and order, the Board first gives the procedural history of this case, followed by the facts. The Board then discusses the alleged violation and renders its legal conclusions.

**PROCEDURAL HISTORY**

On November 15, 2002, the Agency filed the administrative citation against Mr. Cadwallader with the Board. On December 23, 2002, Mr. Cadwallader filed with the Board a petition to contest the administrative citation.<sup>1</sup> Board Hearing Officer Carol Sudman held this

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<sup>1</sup> The Board cites the administrative citation as “AC at\_” and Mr. Cadwallader’s petition as “Pet. at \_.”

case's hearing on October 29, 2003, at the Putnam County Courthouse in Hennepin. Two witnesses testified: Agency inspector Kaare Jacobsen; and Mr. Cadwallader.<sup>2</sup> Hearing Officer Sudman found both witnesses credible. Tr. at 22.

The Agency offered one exhibit at hearing, which was admitted into the record: an open dump inspection checklist, dated September 24, 2002. Mr. Cadwallader offered no exhibits at hearing.<sup>3</sup> The Agency filed a brief on January 5, 2004. A briefing schedule allowed both parties to file post-hearing briefs, but Mr. Cadwallader never filed a response brief.<sup>4</sup>

### FACTS

On September 24, 2002, Kaare Jacobsen, an Environmental Specialist with the Agency, inspected a site located at 610 North School Street in Granville. Tr. at 7, 9; Agency Exh. at 3. The business at the site is known as D.C. Enterprises, and Mr. Cadwallader was operating the site at the time of the inspection. Tr. at 8, 20; Agency Exh. at 1, 3. The purpose of the site inspection was to see if purported "solid waste and used/waste tires," identified in prior inspections, had been removed from the property. Agency Exh. at 3.

During the September 24, 2002 inspection, the following materials were observed on the ground and out in the open at the site: piles of metal, wire, lawn mowers, and used automobile tires and rear agricultural tires, at various locations around the site, some with vegetation growing around them; collections of used refrigerators and an old exercise treadmill; and the burned remains of a mobile home. Tr. at 10-12; Agency Exh. at 3-4, Photos 1-18. "[R]ecyclable metals" were among the materials at the site on September 24, 2002. Tr. at 10-11.

Mr. Jacobsen inspected the site several times over 2001 and 2002. Tr. at 9, 13, 15-16; Agency Exh. at 3. The inspection immediately before the inspection of September 24, 2002, took place on July 15, 2002. Agency Exh. at 1. Over 2001 and 2002, during which time Mr. Cadwallader was operating the site, different materials purported to be "waste" were observed on the site. However, the volume remained constant at over 250 yards, and very little alleged "waste" material and used tires were removed from the site. Agency Exh. at 3; Tr. at 15-16.

The site has been used as a salvage yard since the 1960's or 1970's. Tr. at 13, 18. In the late 1990's, Mr. Cadwallader began negotiating to acquire the site from the Young family, the former owner and operator of the site. Tr. at 17-18. At the time the negotiations began, Robert Young and his son had passed away, leaving the property to Robert Young's widow, Jennifer Young. Tr. at 17-18; Agency Exh. at 3. The negotiations to acquire the property took five years. Tr. at 18; Agency Exh. at 3. During this time period, and at least by Spring 2001, Mr. Cadwallader was operating the site. Tr. at 18; Agency Exh. at 3.

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<sup>2</sup> The Board cites the hearing transcript as "Tr. at \_."

<sup>3</sup> The Board cites the Agency's hearing exhibit as "Agency Exh. at \_."

<sup>4</sup> The Board cites the Agency's brief as "Agency Br. at \_."

On June 15, 2002, Mr. Cadwallader represented to Mr. Jacobsen that he was the sole proprietor of the site, though he does not hold title personally. Tr. at 8, 16, 19; Agency Exh. at 3. Mr. Cadwallader acquired the site to operate it as a salvage yard. Tr. at 19. The condition of the site regarding the presence of “dumped” materials was substantially the same under the prior owner as when Mr. Cadwallader “took over.” Tr. at 13-14.

While title to the property was still with the Young family, Mr. Cadwallader began “taking in numerous types of salvageable metal” onto the site, and Mrs. Young “left the removal of the solid waste on the premises up to Mr. Cadwallader.” Agency Exh. at 3; Tr. at 14. Mr. Cadwallader did not personally place on the site any of the materials identified during the September 24, 2002 inspection. Mr. Cadwallader did not give permission for all of the material identified at the site to be deposited there. Tr. at 18-19. The site has no fence and is easily accessible from a heavily trafficked roadway. Material is “dumped” on the site very frequently. Tr. at 9, 14-15, 19. Mr. Cadwallader presently loads scrap metal for removal from the site twice per month. Tr. at 19; Agency Exh. at 3.

### **DISCUSSION**

Under the Environmental Protection Act (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 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, 42(b)(4), (4-5) (2002); 35 Ill. Adm. Code 108. The appellate court has described the Board’s administrative citation process as follows: “the administrative citation proceeding is to the Act as traffic citations are to the body of criminal law.” Miller v. PCB, 267 Ill. App. 3d 160, 167, 642 N.E.2d 475, 482 (4th Dist. 1994).

A respondent issued an administrative citation may pay the civil penalty or challenge the administrative citation by filing a petition with the Board. If a violation is proven, the only statutory defense to an administrative citation is that the violation resulted from “uncontrollable circumstances.” If a respondent goes to hearing and loses, the Board must impose on the respondent the civil penalty and the hearing costs of the Board and the complainant. *See* 415 ILCS 5/3.305, 3.445, 21(o), (p), 31.1, 42(b)(4), (4-5) (2002); 35 Ill. Adm. Code 108.

### **Alleged Violation**

In this case, the Agency’s administrative citation alleges that Mr. Cadwallader violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2002)) by causing or allowing the open dumping of waste in a manner resulting in litter. AC at 2. Mr. Cadwallader denies the alleged violation. Pet. at 2. Section 21(p)(1) of the Act provides that “[n]o 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: litter.” 415 ILCS 5/21(p)(1) (2002).

### **“Open Dumping” of “Waste”**

As a threshold matter, to prove a violation of Section 21(p)(1), the Agency 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). “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).

The Act defines “sanitary landfill” as:

[A] facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day’s operation, or by such other methods and intervals as the Board may provide by regulation. 415 ILCS 5/3.445 (2002).

For the reasons below, the Board finds that “waste” has been “open dumped” at the site. Many items observed during the Agency’s September 24, 2002 inspection were piled haphazardly about the site, including used tires overgrown with weeds. *See, e.g.*, Agency Exh., Photos 1-5, 7, 9-12. Also on the site are the burned remains of a mobile home. *Id.*, Photos 6, 8. The record shows miscellaneous material dumped without Mr. Cadwallader’s permission and scattered throughout the site in a manner that suggests the material has been there a long time and is not intended for, or being handled consistent with, legitimate re-use.

Moreover, though the site is a salvage yard, Mr. Cadwallader does not contend that every item on the site has value or is being recycled. Even if there is some valuable scrap metal at the site being managed properly, the Board finds that at least some of the items consolidated there and identified during the inspection have been “discarded” and thus are “waste” under the Act. *See County of Sangamon v. Daily*, AC 01-16, 01-17, slip op. at 12-13 (Jan. 10, 2002) (despite expressed “intention to use every single discarded item . . . numerous items were not in use, were not useable in their current condition, and were not stored in such a way as to protect any future use”).

In similar situations, the Board has found open dumping. *See Daily*, AC 01-16, 01-17, slip op. at 11 (“statements regarding [respondent’s] intentions to utilize, dispose of, or sell these various materials at some undetermined date in the future are not dispositive of the question of whether the items constitute a waste or litter”); *County of LaSalle v. Raikes*, AC 97-24, slip op.

at 4-6 (Apr. 17, 1997) (despite respondent's argument that "much of the material on his site is scrap metal that has value[,] . . . others dump discarded materials on his property" that constitute waste); County of Jackson v. Easton, AC 96-58, slip op. 2, 4 (Dec. 19, 1996) (presence of tires, metal materials and wiring and household goods on the ground at site supported finding of open dumping). Additionally, the Board finds that Mr. Cadwallader's site does not meet the requirements for a sanitary landfill, which is undisputed.

### **Resulting in "Litter"**

The Board also finds that this open dumping of waste resulted 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).

Many of the items dumped at the site are discarded substances, as discussed, and as such fall within the statutory definition of "litter."

### **"Cause or Allow"**

Mr. Cadwallader does not dispute that at least some of the materials at the site are "waste" and "litter" that have been "open dumped." Instead, Mr. Cadwallader's attorney solicited testimony at hearing in an apparent attempt to establish that his client did not "cause or allow" the open dumping. The evidence does suggest that after Mr. Cadwallader became the site operator, waste was dumped there without his permission, and that Mr. Cadwallader therefore did not intend to or knowingly violate the Act. The evidence also suggests that at least some of the waste on the site may have been dumped there while the Youngs owned and operated the site, *i.e.*, before Mr. Cadwallader began operating the site.

For the reasons below, however, the Board finds that the preponderance of the evidence in this record proves Mr. Cadwallader did, at a minimum, "allow" the open dumping of waste resulting in litter at the site. That others dumped the waste is of no aid to Mr. Cadwallader. The Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. In People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), the Illinois Attorney General alleged that the Fiorinis, as owners and operators of a dump site, had "caused or allowed" the open dumping of waste that others deposited on their site. In discussing the open dumping allegation, the court noted that "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." Fiorini, 143 Ill. 2d at 336, 574 N.E.2d at 618; *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).

While knowledge or intent need not be shown to prove a violation, a respondent must have had the capability to control the source or site of pollution before a violation can be found. See Fiorini, 143 Ill. 2d at 346, 574 N.E.2d at 623 (“The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.”). Ownership of property is accordingly not a prerequisite to violating Section 21(p)(1) of the Act. A complainant “must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred.” People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793-96, 618 N.E.2d 1282, 1286-88 (5th Dist. 1993).

The Board finds that Mr. Cadwallader was capable of exercising control over the site as its operator when dumping occurred. He nevertheless failed to take reasonable precautions against trespassers, like installing a fence, despite the easy access to the site and repeated dumping over the years. In fact, there is no evidence in the record that Mr. Cadwallader took *any* measures to prevent unauthorized dumping on the site. The Board therefore finds that Mr. Cadwallader “allowed” the dumping by failing to have adequate security over the site he controlled. See Perkinson v. PCB, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3d Dist. 1989) (“the owner of the source of pollution causes or allows the pollution . . . unless the facts establish the owner either lacked the capability to control the source . . . or had undertaken extensive precautions”); Meadowlark Farms, Inc., v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974) (property owner violated Act’s prohibition on causing or allowing discharge resulting in water pollution because the owner had the “capability of controlling the polluttional discharge”); County of Will v. Utilities Unlimited, Inc., AC 97-41, slip op. at 5 (July 24, 1997).

Even if waste was dumped at the site under the prior owner and operator, Mr. Cadwallader has been in charge of the site since at least 2001 and is liable for letting the material remain on the site while under his control. The Board has held that a violation of Section 21(p)(1) for “allowing” litter can be found based on present inaction on the part of a current owner or operator to remedy a previously caused violation. In IEPA v. Rawe, AC 92-5 (Oct. 16, 1992), the Board held:

[P]assive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. \*\*\* 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. Rawe, AC 92-5, slip op. at 6; see also IEPA v. Goodwin, AC 02-17, slip op. at 4 (July 11, 2002) (“Since 1998, Mr. Goodwin has owned and controlled the property and has left the litter that had previously been dumped on the site to remain. Such inaction qualifies as an ‘allowance’ under 415 ILCS 5/21 (p)(1) (2000).”).

The Board therefore finds that Mr. Cadwallader violated Section 21(p)(1) of the Act by causing or allowing the open dumping of waste in a manner that resulted in litter.

### **“Uncontrollable Circumstances”**

The attorney for Mr. Cadwallader introduced evidence at hearing to apparently try to establish the Mr. Cadwallader could not control the dumping that occurs at the site. In an administrative citation, the Board must determine whether the violation 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).

The evidence in the record does not show that Mr. Cadwallader’s violation of Section 21(p)(1) of the Act resulted from “uncontrollable circumstances.” On the contrary, taking basic security measures at the site could have prevented dumping by others. Mr. Cadwallader was responsible for taking reasonable steps to secure the site from unauthorized access and failed to do so. The Board cannot find that the open dumping resulted from factors beyond Mr. Cadwallader’s control. Because Mr. Cadwallader’s has not proven that his violation of Section 21(p)(1) resulted from “uncontrollable circumstances,” he is liable for a civil penalty and hearing costs.

### **Civil Penalty and Hearing Costs**

Having found that Mr. Cadwallader violated Section 21(p)(1) of the Act, 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 a \$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).

Accordingly, the Board must impose a civil penalty on Mr. Cadwallader. There is no indication that this is a second or subsequent adjudicated violation for Mr. Cadwallader. Therefore, the civil penalty for this first violation of Section 21(p)(1) by Mr. Cadwallader is statutorily set at \$1,500, and the Board will assess the penalty in its final opinion and order. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500(b)(2).

In addition, by unsuccessfully contesting the administrative citation at hearing, Mr. Cadwallader also must pay the hearing costs of the Agency 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 Agency 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 Mr. Cadwallader. Mr. Cadwallader will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

### **CONCLUSION**

The Board finds that Mr. Cadwallader violated Section 21(p)(1) of the Act by causing or allowing the open dumping of waste resulting in litter. Having found the violation in this administrative citation action, Mr. Cadwallader must pay a civil penalty of \$1,500 and the hearing costs of the Agency and the Board. As provided in the order below, the Board directs the Agency and the Clerk of the Board to file hearing cost documentation, to which Mr. Cadwallader may respond. After the time periods for the filings on hearing costs have run, the Board will issue a final opinion and order imposing the civil penalty on Mr. Cadwallader and assessing against him any appropriate hearing costs.

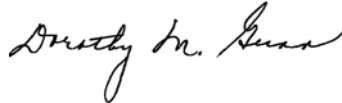
This interim opinion constitutes the Board's interim findings of fact and conclusions of law.

### **ORDER**

1. Respondent Dan Cadwallader violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2002)).
2. By June 10, 2004, the Illinois Environmental Protection Agency must file a statement of its hearing costs, supported by affidavit, with service on Mr. Cadwallader. By June 10, 2004, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit, with service on Mr. Cadwallader.
3. By July 1, 2004, Mr. Cadwallader may file a response with the Board to the filings required in paragraph 2 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 May 20, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board