

ILLINOIS POLLUTION CONTROL BOARD

September 2, 2004

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 04-27
	)	(IEPA No. 686-03-AC)
DOUGLAS S. CARRICO d/b/a CARRICO'S	)	(Administrative Citation)
AUTO HEAP,	)	
	)	
Respondent.	)	

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

DOUGLAS S. CARRICO APPEARED *PRO SE*.

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

Today the Board finds that respondent Douglas S. Carrico d/b/a Carrico's Auto Heap (Carrico) violated Section 21(p)(1) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) (2002)) at a former salvage yard in Kane, Greene County. Carrico violated the Act by 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, Carrico 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 Carrico 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 gives the procedural history of this case, followed by the facts. The Board then discusses the alleged violation and Carrico's claimed defenses before the Board renders its legal conclusions.

**PROCEDURAL HISTORY**

On December 1, 2003, the Agency filed the administrative citation against Carrico with the Board. On January 6, 2004, Carrico timely filed a petition to contest the administrative citation.<sup>1</sup> Board Hearing Officer Carol Sudman held this case's hearing on April 7, 2004, at the

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<sup>1</sup> The Board cites the administrative citation as "AC at\_" and Carrico's petition as "Pet. at \_."

City Hall Council Room in Carrolton, Greene County. Two witnesses testified: Agency field inspector Jan Mier; and Carrico.<sup>2</sup> Hearing Officer Sudman found both witnesses credible. Tr. at 52.

The Agency offered six exhibits at hearing, all of which were admitted into the record.<sup>3</sup> Carrico did not formally move to enter any hearing exhibits, but he did bring photos of the site taken the day before the hearing and a summary of used and waste tire provisions from the Act and Board regulations. These items were not admitted at hearing. Tr. at 32, 49-51. The Agency filed a brief on May 5, 2004, and Carrico filed a response brief on June 2, 2004. The briefing schedule allowed the Agency to file a reply brief, but one was not filed.<sup>4</sup>

## **FACTS**

### **The Salvage Yard**

Carrico owns property at 19290 Carricos Road, in Kane, Greene County. The site had been the location of his salvage yard business known as Carrico's Auto Heap. Carrico's Auto Heap went out of business in 2002. In the summer of 2002, Carrico relinquished his business license to operate the salvage yard, but he continued operating on weekends for some time. The site had been used for this salvage yard business for roughly eight years, and Carrico had been licensed in the salvage business for 18 years. Tr. at 6-7, 14-15, 24, 28, 33-34; Agency Exh. 1 at 1; Resp. Br. at 1. Carrico began cleaning up the site in July or August of 2002 when he relinquished his salvage license. Tr. at 35.

### **July 2002**

On July 24, 2002, the Agency issued Carrico a "Non-Compliance Advisory Letter." Agency Exh. 2. Agency field inspector Jan Mier explained that the Agency sends Non-Compliance Advisory Letters "when we hope the violations will be cleared up fairly soon and that will be the end of it." Tr. at 37. The letter to Carrico was based on a June 27, 2002 inspection, which was Mier's first inspection of the site. Agency Exh. 2. The Secretary of State had advised the Agency of the site because the salvage business closed down. Tr. at 14-15.

The Agency's July 24, 2002 letter notified Carrico of "apparent violations" and instructed him what he must do to "correct the apparent violations." Agency Exh. 2 at 1. The letter stated that by September 30, 2002, Carrico had to "properly remove all vehicles, scrap metal and batteries from the site." *Id.*; see also Tr. at 37-38. The letter also stated that by September 30, 2002, Carrico had to either take the site's:

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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 exhibits as "Agency Exh. \_ at \_."

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

used or waste tires . . . to a registered tire storage or tire disposal facility, or . . . enter into a Consensual Removal Agreement with the Illinois EPA. Since you have less than 1000 used or waste tires, the Illinois EPA would be willing to conduct and pay for the removal of the tires, provided you sign . . . a Consensual Removal Agreement that will allow the Illinois EPA's contractor to enter your property. Tires will not be removed from your property by the Illinois EPA's contractor until you begin removal [of] all other open dumped waste and refuse. Agency Exh. 2 at 1 (emphasis in original).

The July 24, 2002 letter concluded by notifying Carrico that if he did not adequately respond, the Agency may issue a formal "Violation Notice" under Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (2002)). Exh. 2 at 2. Carrico entered into a "Consensual Removal Agreement," under which the Agency removed 1,000 tires from the site at no cost to Carrico. Tr. at 41-42.

### **January 2003**

On January 14, 2003, the Agency issued a Violation Notice to Carrico based on a December 5, 2002 site inspection. Exh. 3 at 1. The Agency issued the Violation Notice because Carrico had not finished cleaning up the site by the September 30, 2002 cleanup deadline set forth in the Agency's July 24, 2002 letter. Tr. at 38. The January 14, 2003 letter advised Carrico of his opportunity to meet with the Agency and to submit a "Compliance Commitment Agreement" for correcting the alleged violations himself. Exh. 3 at 1.

The Violation Notice alleged violations of the Act and Board regulations and gave an "explanation of the activities that the Illinois EPA believes may resolve the specified violations, including an estimate of the reasonable time period to complete the necessary activities." Exh. 3 at 1. The letter further noted that "resolution of the violations may require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of civil penalties." *Id.*

Among other violations noticed in the January 14, 2003 letter, the Agency alleged that Carrico violated Section 21(p)(1) of the Act by causing or allowing the open dumping of waste resulting in litter. Exh. 3, Attachment A at 1-2. The letter stated that litter was observed on the site and that this alleged violation "shall be enforceable by the Agency either by administrative citation under Section 31.1 of this Act or as otherwise provided by this Act." *Id.* at 2. The Violation Notice also stated that Carrico had failed to submit a "Tire Removal Agreement." *Id.*

The Violation Notice gave Carrico until February 28, 2003, to submit a Tire Removal Agreement or to properly remove all used and waste tires on the site. The Agency inspector was particularly concerned about tires in part because they serve as a breeding ground for mosquitoes that carry the West Nile virus. The Violation Notice also gave Carrico until March 7, 2003, to "submit to the Illinois EPA copies of receipts and/or manifests that document the proper disposal or recycling of the wastes," referring to the items on the site other than tires. Exh. 3; Tr. at 38-39, 43.

### **March 2003**

In a March 18, 2003 letter to Carrico, the Agency accepted a Compliance Commitment Agreement submitted by Carrico in response to the Violation Notice. The letter further provided that an “extension of the compliance deadline is given until April 15, 2003.” Exh. 4 at 1; Tr. at 39. The letter also notes that failure to meet the compliance schedule “may result in referral of the matter to the Office of the Attorney General, the State’s Attorney of Greene County, or the United States Environmental Protection Agency.” Exh. 4 at 1.

### **June 2003**

On June 12, 2003, the Agency advised Carrico by letter that violations were still observed during a June 2, 2003 site inspection. Exh. 5. After noting that “an extension to the compliance deadline has been given until July 1, 2003,” the letter concluded: “If final cleanup has not been completed by July 1, 2003, enforcement action, including monetary penalties, may result.” *Id.*; Tr. at 40.

### **July 2003**

In a July 9, 2003 letter to Carrico, the Agency acknowledged having received from Carrico disposal receipts and a receipt for mosquito larvicide. Exh. 6. The letter extended the compliance deadline to September 30, 2003. *Id.*; Tr. at 41.

### **October 2003**

On October 28, 2003, Agency inspector Meir re-inspected the site. Tr. at 6-7; Agency Exh. 1 at 1, Narrative. This was Meir’s fourth inspection of the site. Tr. at 7. Her October 28, 2003 report notes that the Agency removed 1,000 tires from the site under a Consensual Removal Agreement, that Carrico had sent in receipts for removal of over 3,300 tires, and that the majority of vehicles had been removed from the site. Exh. 1, Narrative. However, Carrico had not completed the cleanup by the time of the October 28, 2003 inspection. Tr. at 35. At the time, the site contained, among other things, an estimated 15 vehicles and 75 tires. Tr. at 35-36; Exh. 1, Narrative.

Specifically, during the October 28, 2003 site inspection, the following materials were observed on the ground and, unless otherwise noted, out in the open: vehicle parts, scrap metal, and a bathtub (Exh. 1, photo #001); rusted truck bed with six off-rim tires surrounded by vegetation (*id.*, photo #002); tires, metal, auto parts, and plastic scattered in front of a shed (*id.*, photo #003); a car crusher surrounded by broken glass, metal, plastic, and oil (*id.*, photo #004); an inoperable school bus (*id.*, photo #005); several areas with glass, metal, plastic, car parts, and inoperable vehicles scattered around (*id.*, photo #6); metal, glass, on-axle tires, and lumber (*id.*, photo #007); lumber in weeds (*id.*, photo #008); on-axle tires, metal, vehicle parts, and some damaged vehicles in weeds (*id.*, photos #009, 010); cardboard and rusted pipe surrounded by vegetation (*id.*, photo #011); off-rim tractor tires (*id.*, photo #012); and a shed containing piles of car parts, tools, and tires (*id.*, photo #13). *See also* Tr. at 8-9, 34-35.

Meir noted in her October 2003 report that there appeared to be little change at the site since the June 2, 2003 inspection (Exh. 1 at 1, Narrative), but Carrico testified that he removed approximately 800 tires, 50 tons of scrap metal, and nine car bodies during that timeframe (Tr. at 16-17). No materials were added to the site since Carrico stopped conducting the salvage business in July or August of 2002. Tr. at 17, 33-34.

### **DISCUSSION**

By way of background, 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.

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 5/31.1, 42(b)(4), (4-5) (2002); 35 Ill. Adm. Code 108.

In this case, the Agency issued an administrative citation to Carrico, alleging an open dumping violation. As noted, Carrico petitioned to contest the administrative citation and the Board held a hearing. Below, the Board discusses the alleged violation and Carrico’s claimed defenses to liability before rendering the Board’s legal conclusion on whether Carrico violated the Act. The Board then concludes by discussing civil penalty and hearing costs.

### **Alleged Violation**

The Agency’s administrative citation alleges that Carrico 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. Section 21(p)(1) of the Act provides:

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: litter. 415 ILCS 5/21(p)(1) (2002).

The Agency bases its allegations on the October 28, 2003 site visit conducted by Agency inspector Mier. AC at 1.

### **Carrico’s Claimed Defenses**

Carrico denies the alleged violation. Pet. at 2. Carrico asserts three purported defenses to the administrative citation. First, Carrico argues that all of the material on the site was left over from his salvage business, which he had legally operated on the site for a number of years. Pet.

at 2; Resp. Br. at 1-2, 4. He maintains that “it was not dumping, it was not waste, it was not litter and it was not illegal.” Resp. Br. at 1. Essentially, in his first argument, Carrico asserts that he is not liable because he did not “cause or allow” open dumping, but rather ran a legal salvage yard.

Second, Carrico argues that he cooperated with the Agency and was diligently working toward cleaning up the site. Pet. at 3; Resp. Br. at 2-4. Under these circumstances, Carrico assumed that he would continue to get extensions of the cleanup deadline from the Agency until the job was finished. Tr. at 49. Carrico also thought he had two years to remove tires under the used tire program. Pet. at 2; Resp. Br. at 2-3. At bottom, in his second argument, Carrico asserts that the administrative citation was improperly issued because he was proceeding in good faith under the Act’s pre-enforcement process and used tire program.

Third, Carrico argues that the cleanup was delayed because the Agency’s tire recycling contractor underestimated the amount of used tires on the site. In effect, Carrico argues that he is not liable because delays in his cleanup were “caused by the inaccurate estimate of tires” (Pet. at 3), suggesting that any violation resulted from circumstances beyond his control or “uncontrollable circumstances.”

The Board addresses each of Carrico’s three claimed defenses below in discussing the elements of a Section 21(p)(1) violation.

### **“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).

For the reasons below, the Board finds that “waste” has been “open dumped” at the site. Even without regard to the used tires on-site, many items observed during the Agency’s October 28, 2003 inspection were piled haphazardly about the site, including inoperable and damaged vehicles. Tr. at 8-9, 22, 34-36; Agency Exh. 1 at 7, 9-15. The record shows miscellaneous material scattered on the ground about the site with vegetation growing over it, indicating the material had been there a long time. Exh. 1 at 9-15. Carrico concedes that inspector Mier never told him that he did not have to remove the non-tire waste. Tr. at 35.

The salvage yard had been closed for over a year at the time of the October 2003 inspection. No materials had been added to the site since the salvage business ceased in the

summer of 2002. Therefore, the remaining materials had been on-site for a substantial period of time. On this record, the Board cannot find that every item remaining on the site had value, was being handled consistent with legitimate re-use, or was being promptly removed for disposal. Even if there was some valuable material being managed properly at the time of the inspection, the Board finds that at least some of the items consolidated there and identified during the inspection were “discarded” and thus “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 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 Carrico’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 remaining at the site were discarded substances, including vehicle parts, metal, glass, and plastic, and as such fall within the definition of “litter.”

### **“Cause or Allow”**

In his first claimed defense, Carrico argues that he did not “cause or allow” open dumping because no materials were added to the site since the end of his salvage business and he was cleaning up the site at the Agency’s direction when the Agency issued the administrative citation.

Specifically, according to Carrico, he held business licenses that allowed him to operate as a “scrap processor” and “automotive parts recycler” at the site. Resp. Br. at 1; Tr. at 16. He claims that all of the alleged waste at the site was actually “product or by-product of the legally licensed business of Carrico’s Auto Heap” (*i.e.*, “left over from conducting business”), that no

materials were added after the salvage operation ceased, and that he was in the process of cleaning up the remaining materials on the site when the administrative citation issued. Resp. Br. at 1; Tr. at 16, 23-26. As of the April 2004 hearing, Carrico testified that all of the tires had been removed, and that he had removed most but not all of the other identified materials, including metal parts, cars, plastic, and glass. Tr. at 26, 29-31.

For the reasons below, the Board finds that the preponderance of the evidence in this record proves Carrico did, at a minimum, “allow” the open dumping of waste resulting in litter at the site. That Carrico never intended to violate the Act because the materials were allegedly brought legitimately to the salvage yard in the first place is of no aid to Carrico under the circumstances of this case. 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).

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.”). 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). Carrico does not dispute that he owned and operated the site both during and after his salvage business. Tr. at 7, 33. The Board finds that Carrico controlled the site.

Waste has remained on-site for over a year since Carrico’s salvage business stopped, despite repeated cleanup opportunities and extensions of cleanup deadlines provided by the Agency. Carrico admitted that he was aware of the cleanup deadlines set forth in the letters he received from the Agency. Tr. at 35, 49. The Agency gave Carrico four separate extensions of the deadline for removing waste from the site.

Specifically, the original cleanup deadline was September 30, 2002, a little over two months after the Agency’s Non-Compliance Advisory Letter and a little over three months after the initial site inspection. The Agency then gave Carrico a 5-month extension of the cleanup deadline, to February 28, 2003, for tires and to March 7, 2003, for other waste. This was followed by an extension to April 15, 2003. Finally, the Agency gave Carrico another 5-month extension, moving the cleanup deadline back to September 30, 2003. As of the October 28, 2003 site inspection, one month after the last cleanup deadline given by the Agency, Carrico had still not completed the cleanup. Accordingly, when the violations were observed, some 15 to 16 months had passed since Carrico ceased operating.



Under the particular facts of this case, the Board finds that Carrico “allowed” the open dumping of waste resulting in litter by letting waste remain for this duration on the site under his control. Even if all of the materials were brought to the site while the salvage yard was legally operating, the Board has held that a current owner or operator can be found to have “allowed” litter in violation of Section 21(p)(1) by failing to remove an accumulation of refuse for which that person was not initially liable. *See IEPA v. Rawe*, AC 92-5, slip op. at 6 (Oct. 16, 1992); *see also IEPA v. Goodwin*, AC 02-17, slip op. at 4 (July 11, 2002). The Board’s holding that Carrico allowed open dumping is based on the specific circumstances of this case, and the Board is in no way holding that the otherwise lawful operation of a scrap processing and recycling facility constitutes *per se* open dumping. Nor is the Board today establishing any “bright-line” time period for cleaning up salvage yards.

### **Alleged Improper Issuance of the Administrative Citation**

In his second purported defense, Carrico maintains that the administrative citation was improperly issued because he had been diligently cooperating with the Agency and therefore expected to have more time to finish the cleanup. Carrico states that when requested to clean up the site by the Agency, he undertook and proceeded with the required clean up “as quickly as circumstances allowed” (Br. at 2), noting that he works full time as a truck driver (Pet. at 3; Tr. at 19, 27).

Carrico further argues that his cleanup focused first on tire removal because it was the Agency’s priority, and that he had additional time for tire removal under a purported Tire Removal Agreement with the Agency. Tr. at 19, 43-44; Br. at 2-3; Pet. at 3. Carrico testified that he put his available funds toward removing the tires and left the metal and other materials for after the tire removal. Tr. at 19-20, 28. Carrico states that from July 2002 to October 2003, he removed the following from his site: 6,110 tires; 12.75 tons of “waste”; and 410,043.08 lbs. of “metal (45 loads) which included approx. 400 car bodies.” Resp. Br. at 3. The Agency does not dispute these figures. Carrico further states that the “amount of product still on site at the time of the last inspection was a small amount in comparison to what had actually been removed to that point in the ongoing process of clean up.” *Id.*

According to Carrico, if he had not focused on the tires, but instead removed all wastes at the same rate, “there would still be tires there now and there would maybe be less metal parts and things.” Tr. at 47. Carrico emphasized that “I’m not dragging my feet [and] I’ve always tried to cooperate and do my best and I just feel it is very unfair to impose a fine on me for doing the best that I can.” *Id.*

The Agency states that it never gave Carrico two years to remove the tires. Tr. at 45. Nor did the Agency inspector tell Carrico that he did not have to remove the non-tire waste on his property. Tr. at 35, 43-44. Further, Carrico never executed a Tire Removal Agreement. Instead, Carrico signed a Consensual Removal Agreement, giving site access to the Agency’s tire recycler to remove 1,000 tires at no charge to Carrico. Carrico conceded at hearing that what he had thought was the Tire Removal Agreement was actually the Consensual Removal Agreement, and that he got the reference to having two years for tire removal from a summary of Board regulations on used tires, not any agreement. Tr. at 46-49, 50-51.

The Board notes that besides the administrative citation process, two other processes under the Act came into play in this case: the pre-enforcement process under Section 31 of the Act (415 ILCS 5/31 (2002)); and the used tire program under Title XIV of the Act (415 ILCS 5/53-55.15 (2002)).

Section 31 of the Act sets forth a required 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 for the filing of a formal complaint. *See* 415 ILCS 5/31(b) (2002).

Title XIV of the Act sets forth prohibitions and requirements with respect to the handling of used and waste tires, includes provisions for the Agency and owners and operators to remove used and waste tires, and provides for the creation of the Used Tire Management Fund. *See* 415 ILCS 5/53-55.15 (2002). Certain tire disposal site owners and operators are required to file and receive Agency approval of a Tire Removal Agreement with a schedule for the owner or operator to complete removal activities. *See* 415 ILCS 5/55.4 (2002). Under Title XIV, the Board adopted regulations for the management of used and waste tires. *See* 35 Ill. Adm. Code 848.

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. Jack Wright, AC 89-227 (Aug. 30, 1990). Because the particular facts are especially critical to this analysis, the Board will discuss the facts of Jack Wright in detail.

In Jack 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* Jack 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 may result in enforcement, such as by enforcement action or administrative citation before the Board. *See* Jack 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. Jack Wright, AC 89-227, slip op. at 5.

The Board finds, however, that Jack Wright is distinguishable from the Carrico case. Unlike Wright, Carrico did not complete his cleanup within the Agency-given time period, even as extended. Jack 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 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.” Jack Wright, AC 89-227, slip op. at 7.

The Board in Jack Wright foresaw circumstances like those present in the Carrico 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.* Jack Wright, AC 89-227, slip op. at 7 (emphasis added).

Here, the Agency’s last deadline extension gave Carrico until September 30, 2003, to finish the cleanup. The Agency re-inspected on October 28, 2003, observed the alleged violation, and issued the administrative citation. The Board finds nothing inappropriate about the Agency’s use of the Section 31 pre-enforcement process before issuing the administrative citation in this case.

Section 31.1(a) 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 Jack 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. Jack Wright, AC 89-227, slip op. at 5-6 (emphasis in original).

No formal complaint was filed against Carrico alleging a violation of Section 21(p)(1) of the Act based on the October 28, 2003 site conditions that led to the administrative citation. The Board does not find that the Agency's course of conduct runs afoul of Section 31.1(a).

Moreover, nothing in Section 31 of the Act requires the Agency to continue giving a potential violator extensions of a cleanup deadline. Carrico acknowledged that each Agency letter providing an extension of the cleanup deadline warned him of potential legal action. Tr. at 49. However, Carrico assumed to his detriment that the letters' warnings of potential legal action for failing to meet cleanup deadlines were not serious. He testified: "So, even though [the cleanup] was taking more time than anticipated, I assumed [the warnings that legal action may be taken] to be kind of a form letter, something that you put in every letter and so I didn't expect to have this happen." Tr. at 43. He added: "I was assuming that since [the Agency] had worked with me, they would continue to work with me." Tr. at 49. Though Carrico may have thought the Agency would keep granting him extensions to clean up all of the litter on the site, the Agency was not required under the Act to do so.

Nor does Section 31 state that unresolved violations must be referred to the Attorney General's Office for the filing of a formal complaint. The Agency used the Section 31 pre-enforcement process to get Carrico to clean up most of the site. The Board finds that the Agency was within its discretion in issuing an administrative citation when faced with the remaining waste after Carrico had, over a year into his cleanup, failed to comply with the fourth cleanup deadline extension.

Finally, the Agency's use of the Act's used tire program does not provide a defense for Carrico. Though he was given the opportunity, Carrico never entered into a Tire Removal Agreement, under which he would have committed to removing tires. *See* 415 ILCS 5/55.4 (2002). Even if he had entered into one, for sites with more than 1,000 but less than 10,000 tires, the Act and Board regulations generally allow *up to* two years for tire removal, not necessarily a full two years in every instance. *See* 415 ILCS 5/55.4(d) (2002); 35 Ill. Adm. Code 848.504(a). Further, Carrico benefited from the used tire program by entering into the Consensual Removal Agreement, under which the Agency's tire recycler removed 1,000 tires from the site at no cost to Carrico. *See* 415 ILCS 5/55.3(c) (2002)).

The Board has held that a respondent's mere participation in the tire program does not insulate the person from administrative citation liability. *See IEPA v. Susan Simon d/b/a Berman's Auto Parts*, AC 02-2, slip op. at 5-6 (Aug. 8, 2002) (After finding that respondents "did not comply with the directives of the Agency," the Board held that respondents' "argument that their agreement with the Agency pursuant to the Used Tire Management Act [Title XIV of the Act] somehow excuses them from the alleged violation that resulted in an administrative citation is not meritorious."). Under the facts of this case, the Board finds that Carrico's alleged defense based on the Agency's use of the used tire program fails.

### **Alleged “Uncontrollable Circumstances”**

In his third claimed defense, Carrico suggests that it was not possible for him to have cleaned up the waste by the last deadline because the Agency’s tire removal contractor underestimated the amount of tires on the site. Pet. 3. Carrico argues that he was delayed by the inaccurate estimate because he planned to remove the smaller amount. According to Carrico, the Agency’s tire recycler estimated the amount of tires on-site as 2,500, when there were actually 6,110 tires. The Agency does not dispute this. Carrico states that it took longer, all of 13 months, to remove this larger amount of tires. Tr. at 20, 46.

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).

This defense is therefore available only where the violation resulted from uncontrollable circumstances. The Board finds that the Agency tire removal contractor’s inaccurately low estimate of the number of tires on-site did not cause a violation of Section 21(p)(1) of the Act. Carrico asserts that everything on the site was accepted as part of his salvage business. Having so asserted, Carrico cannot then blame the Agency for his failure to know how many tires he received at his site as part of that business. Carrico, and not the Agency, was responsible for the materials on Carrico’s salvage yard and their timely cleanup. Carrico has not proven uncontrollable circumstances.

### **Finding of Violation**

Having found that Carrico allowed the open dumping of waste resulting in litter, that the administrative citation was properly issued, and that no uncontrollable circumstances were established, the Board finds that Carrico violated Section 21(p)(1) of the Act.

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

The Agency seeks the statutory \$1,500 civil penalty, as well as hearing costs. AC at 2. Because Carrico violated Section 21(p)(1), 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).

Carrico testified that he is making progress on the cleanup, that he has made progress ever since starting the cleanup, and that any civil penalty will simply take money away from and delay the clean up. Tr. at 26-27, 29-31. 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 5/33(c), 42(h) (2002). The Board has no such discretion after finding a violation in an administrative citation action. The Board must impose a civil penalty on Carrico.

There is no indication that this is a second or subsequent adjudicated violation for Carrico. Therefore, the civil penalty for this first violation of Section 21(p)(1) by Carrico 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, Carrico 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 Carrico. Carrico will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

### **CONCLUSION**

The Board finds that Carrico violated Section 21(p)(1) of the Act by allowing the open dumping of waste resulting in litter. Having found the violation in this administrative citation action, Carrico must pay a civil penalty of \$1,500 and the hearing costs of the Agency and the Board. As set forth in the order below, the Board directs the Agency and the Clerk of the Board to file hearing cost documentation, to which Carrico 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 Carrico and assessing against him any appropriate hearing costs.

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

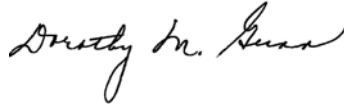
### **ORDER**

1. Respondent Douglas S. Carrico d/b/a Carrico's Auto Heap (Carrico) violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2002)).
2. By September 22, 2004, the Illinois Environmental Protection Agency must file a statement of its hearing costs, supported by affidavit, with service on Carrico. By September 22, 2004, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit, with service on Carrico.

3. By October 12, 2004, Carrico 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 September 2, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board