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result of Mr. Elenberger's inspection on November 30, 1991, an inspection report was submitted which resulted in the filing of this administrative citation. (Tr. at 8, Comp. Exh. 1.) Site three was first discovered during the November 30, 1991 inspection. (Comp. Exh. 1.) The Agency has a record on this site that dates back to 1972. (Tr. at 26.)

From his inspection of the property, Mr. Elenberger observed three different areas containing waste on the property. (Tr. at 9.) Area 1 contains everything from roofing shingles to refrigerators, to bottles and cans. (Tr. at 11.) There is evidence that burning has occurred in this area as shown by the ashes and charred cans. (Tr. at 11.) Area 2 is to the west of area 1 and contains waste similar to the waste in Area 1. (Tr. at 13, Comp. Exh. 1.) Area 3 is located south of Area 1 and contains automobiles that are partially covered. (Tr. at 13, Comp. Exh. 1.) Each area is located in a ravine. (Tr. at 12) Area 1 is approximately 64 x 60 feet and Area 2 is approximately 60 x 40 feet. (Comp. Exh. 1.) Approximate dimensions of area 3 were not provided in the inspection report but from the photograph it appears to be smaller than the other two sites. An earthen berm separates area 1 and area 3. (Tr. at 32.)

Violet and Charles Rawe purchased the property in 1948 (Tr. at 44) and transferred the property to their son, Ronald and his wife Retha in 1978. (Tr. at 35.) The deed transferring the property describes the parcel as follows:

The West Half of the Northwest Quarter of Section 35, Township 11 North, Range 13 West of the Third Principal Meridian which lies South of Carrollton and Newport Road, containing 29.75 acres, more or less.

(Comp. Exh. 1.)

Violet Rawe testified that when the property was purchased the northern boundary was Newport Road, which at that time was a hay pressed road, and the fence line was along the earthen berm. (Tr. at 44-45.) Ronald Rawe also testified to the fence line or property line of the property running along the earthen berm. (Tr. at 36.)

At several points in the transcript, the witness indicated a point on a exhibit when testifying. (Tr. at 22, 23, 25, 36 and 38.) While some of the exhibits were marked showing the general area referenced, the markings did not provide a clear indication of what the witness was indicating. It is necessary that all references to exhibits by witnesses be clearly marked because the Board is not present at the hearing. Without clear and precise markings the Board cannot determine what the witness was indicating.

## DISCUSSION

The Act establishes that, in order to seek enforcement by way of the administrative citation process for violations of Section 21(p), the Agency must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted in litter, open burning or other specified conduct at the dump site. If the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty unless, "...the person appealing the citation has shown that the violation resulted from uncontrollable circumstances." (Section 31.1(d)(2).) Before reaching a determination on whether there was a violation of the Act, the Board must first determine if the Rawes are the owners or operators of the property in question.

## Ownership of Property

Mr. Elenberger determined that the property was owned by Ronald Rawe and Retha Rawe based on an aerial photograph from the Supervisor of Assessment's Office of Greene County. (Tr. at 16.) Mr. Elenberger also consulted a plat book at the Agency to locate the owner of the property. (Tr. at 17, Comp. Exh. 1.) He also obtained the deed to the property from the Recorder of Deeds Office. (Tr. at 18, Comp. Exh. 1.)

The Rawes do not dispute that the area designated as area 3 is their property. However, the Rawes contend that the fence line of their property is along the earthen berm and that area 1 and area 2 are not located within their property. (Tr. at 36.) They assert that they have never exerted any control over the property containing areas 1 and 2. (Tr. at 37.) Mr. Rawe also notes that he pays taxes on 29.75 acres which does not include area 1 and 2. (Tr. at 37, 40.) Mr. Rawe states that Carrollton-Newport Road which is listed as the northern boundary of his property on his deed has been relocated over the years after being washed out into the ditch. (Tr. at 42.) The Rawes also argue that the curvature of the road on the plat maps and the sketch of the site by Mr. Elenberger are different. (Tr. at 22-23, 28-31.) The Rawes further contend that area 1 and area 2 are located within the right-of-way of the Carrollton-Newport road. (Tr. at 46.)

The Board finds that the Agency has failed to show that the property containing area 1 and area 2 is owned by the Rawes. While the plat maps indicate that the Rawes are the owners of the property, the Rawes have provided testimony that persuasively disputes the accuracy of the description of the land on the plat map. The deed is clear that the Rawes own the property located south of the location of the Carrollton-Newport Road at the time the description of the land was drafted. The Rawes provided testimony that the road has been moved since that time. The

Agency has presented no testimony to rebut the Rawes contention that the Carrollton-Newport Road has been relocated and the property line of the Rawes' property is the earthen berm adjacent to the old location of the Carrollton-Newport Road.

The Rawes contend that when the property was originally purchased in 1948, the property line was designated as along the earthen berm. The Rawes have acted in accordance with this property line, exerting no control over the area beyond the earthen berm. The curvature of the road and the slope of the ravine area are consistent with the Rawes' contention that prior roads have been washed out and subsequently moved to the north.

The evidence does not support a finding that Ronald and Retha Rawe are the owners of the property containing area 1 and area 2. Because the Agency has not proven that the Rawes are the owners of area 1 and area 2, the Board does not find a violation against the Rawes concerning these two areas.

The Rawes have admitted that they are the owners of the property containing the partially buried automobiles designated as area 3. Therefore, the Board will next look at the record to determine if the Rawes have violated Section 21 of the Act concerning area 3.

#### Violation of Act

The administrative citation issued against the Rawes alleges violation of subsection (1) of Section 21(p). Section 21(p) provides that no person shall in violation of Section 21(a) of the Act:

cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;

Section 21(a) of the Act sets forth a general prohibition against open dumping by providing that "[n]o person shall cause or allow the open dumping of any waste."

Section 3.24 of the Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1003.24.) Section 3.31 of the Act defines "refuse" as "waste." (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1003.31.) Section 3.53 defines "waste" as, inter alia, "garbage ... or other discarded material ... ." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.53.)

In St. Clair County v. Louis Mund (August 26, 1991), AC 90-64, the Board adopted the definition of litter contained in the Litter Control Act. (Ill. Rev. Stat. 1990 Supp., Ch. 38, par. 86-1 et seq.)

"litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris.....abandoned vehicle....or anything else of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly.

(Ill. Rev. Stat. 1990 supp., ch. 38, par 86.3)

The automobiles in area 3 on the Rawes property are considered as litter based on the above definition.

Mr. Rawe testified that the automobiles in area 3 were placed there by his father in the late 1960's to prevent soil erosion. (Tr. at 39.) He testified that his father had discussed the placement of automobiles in the gully to stop erosion with a representative of the Environmental Protection Agency, who informed him that it would not hurt anything. (Tr. at 39.) He testified that neither he nor any member of his family has put anything in area 3 other than the automobiles. (Tr. at 39.) He argues that because the automobiles were placed there prior to the enactment of the Environmental Protection Act there is no violation.

As a general rule, prospective application of statutes is to be preferred to retroactive, or retrospective application. (Rivard v. Chicago Fire Fighters Union (1988), 122 Ill.2d 303, 522 N.E.2d 1195.) If a particular statute can be characterized as punitive and has an ex post facto effect, retroactive application is not allowed. (People v. Shumpert (1989), 126 Ill. 2d 344, 533 N.E.2d 1106.) Where a statutory amendment involves prior activity or a certain course of conduct, the law to be applied is the provision in effect at the time the course of conduct occurred. (Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62.)

The Board agrees with Mr. Rawes contention that the "cause" language in Section 21 of the Act cannot be applied retroactively to actions that occurred prior to the effective date of the Act because it deals with a certain course of conduct. The evidence supports a finding that the automobiles were placed at the site prior to the enactment of the Act. The automobiles are older models and are almost completely covered. At the time that the automobiles were placed at the site the Act had not been enacted. Therefore, the Board does not find that the Rawes caused litter in area 3 in violation of the Act .

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A violation of Section 21 of the Act can also be found for "allowing" litter. The Board has previously held that "allow" includes present inaction on the part of the landowner to remedy a previously caused violation. (EPA v. Robert Wheeler (January 10, 1991) AC 90-42, EPA v. A.J. Welin (May 13, 1982), PCB 80-125, 47 PCB 07.) The Board has held that passive conduct amounts to acquiescence sufficient to find a violation of Section 21(a) of the Act. (EPA v. Dobbeke et al. (August 22, 1972), PCB 72-130, 5 PCB 219.) In Freeman Coal Mining Corp. v. IPCB (3rd Dist. 1974), 21 Ill. App. 3d 157, 313 N.E.2d 616, the court stated that the Act is malum prohibitum and no proof of guilty knowledge or mens rea is necessary to a finding of guilt. 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.

The Rawes contend that the autos were placed at the site to control erosion with the approval of the Agency in the late 1960's. The Agency has not presented any evidence to rebut the Rawes contention. In closing arguments, the attorney for the Rawes acknowledged that the representation was made by a representative of some state agency. (Tr. at 47.) The Board notes that the Agency did not exist prior to 1970. Therefore, any representation made concerning the use of automobiles to control soil erosion was not made by the Agency. From the testimony it is not evident what the representation was or who made it.

The definition of litter includes abandoned vehicles. The presence of the autos on the site and the failure of the Rawes to take action is sufficient to find a violation of the "allow" language of Section 21 of the Act. The Board finds that the Rawes allowed litter on their property in violation of the Act.

#### Uncontrollable Circumstances

The final question the Board must consider is whether the Rawes have shown that the violation resulted from uncontrollable circumstances. This is the only showing provided in the statute that allows the Board to excuse any violation. If the Board so finds, then no violation would be found and no penalty imposed. (see Section 31.1(d)(2) of the Act).

No evidence was presented concerning any uncontrollable circumstances. Therefore the Board does not find any uncontrollable circumstances. Therefore, the Board finds the Rawes in violation of Section 21(p)(1) of the Act for allowing litter in area 3.

## PENALTIES

Penalties in administrative citation actions of the type here brought are proscribed by Section 42(b)(4) of the Act, to wit:

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 \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979 as amended; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1042(b)(4).)

Respondent will therefore be ordered to pay a civil penalty of \$500 based on the violation as herein found. For purpose of review, today's action (Docket A) constitutes the Board's final action on the matter of the civil penalty.

Respondent is also required to pay hearing costs incurred by the Board and the Agency. The Clerk of the Board and the Agency will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Ronald Rawe and Retha Rawe. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed. Additionally, Docket B will be opened to treat all matters pertinent to the issue of costs.

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

## ORDER

1. Respondent is hereby found to have been in violation on November 30, 1991 of Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1021(p)(1).
2. Within 45 days of this order respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

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Illinois Environmental Protection Agency  
Fiscal Service Division  
2200 Churchill Road  
Springfield, Illinois 62706

Respondent shall include the remittance form and write the case name and number and their social security or federal employer identification number on the certified check or money order.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. 1991, ch. 120, par. 10-1003), as now or hereafter amended, from the date of payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

3. Docket A in this matter is hereby closed.
4. Within 30 days of this order, the Agency shall file statement of its hearing costs, supported by affidavit, with the Board and with service upon Ronald Rawe and Retha Rawe. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Ronald Rawe and Retha Rawe. Such filings shall be entered in Docket B of this matter.
5. Respondent is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this order.

IT IS SO ORDERED.

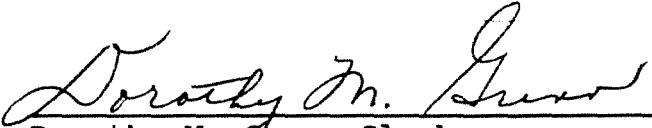
Board Members M. Nardulli and J. Theodore Meyer dissented.

Board Members J. Anderson, J. C. Marlin and G. Tanner Girard concurred.

Section 41 of the Environmental Protection Act (Ill. Rev.Stat. 1991, ch. 111 1/2, par 1041) provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)



I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16<sup>th</sup> day of October, 1992, by a vote of 5-2.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

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