

ILLINOIS POLLUTION CONTROL BOARD

March 16, 2006

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 05-63
)	(IEPA No. 78-05-AC)
JOHN R. MALLOCH,)	(Administrative Citation)
)	
Respondent.)	

MICHELLE M. RYAN, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

JOHN R. MALLOCH APPEARED *PRO SE*.

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

The Board today determines whether respondent John R. Malloch violated the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (2004) at a site located at 2572 County Road 600E, Dewey, Champaign County. For the reasons below, the Board finds that Mr. Malloch violated sections 21(p)(1), 21(p)(3), and 21(p)(7) of the Act (415 ILCS 5/21(p)(1), 21(p)(3), and 21(p)(7) (2004)), by causing or allowing the open dumping of waste resulting in litter, open burning, and the deposition of general construction or demolition debris or clean construction or demolition debris, as alleged by the complainant Illinois Environmental Protection Agency (Agency) in an administrative citation. The Board assesses the statutory penalty of \$4,500 as well as hearing costs as described below.

In this interim opinion and order, the Board first describes the administrative citation process and the procedural history and facts of this case. The Board then sets forth the pertinent provisions of the Act. Next, the Board analyzes the issues and makes its conclusions of law regarding the alleged violations before addressing the issue of penalties.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the Agency and units of local government to enforce specified provisions of the Act through an administrative citation. 415 ILCS 5/31.1 (2004). Part 108 of the Board's procedural rules provides the process for a citation before the Board. 35 Ill. Adm. Code 108.100 *et seq.* Unlike other environmental enforcement proceedings in which the Act prescribes only a maximum penalty, *see, e.g.*, 415 ILCS 5/42(b)(1) (2004), the Act sets specific penalties of \$1,500 for each violation of each provision of Section 21(p) of the Act (415 ILCS 5/21(p) (2004)) and \$3,000 for each second or subsequent violation. 415 ILCS 5/42(b)(4-

5) (2004). In cases such as this, the Board has no authority to consider mitigating or aggravating factors when determining penalty amounts. *Id.* However, “if the Board finds that the person appealing the [administrative] 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) (2004).

PROCEDURAL HISTORY

On April 5, 2005, the Agency issued to the respondent an administrative citation (AC) alleging violations of the Act at 2572 County Road 600E, Dewey, Champaign County. The citation alleges that the respondent violated section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2004)) by causing or allowing the open dumping of waste resulting in litter. AC at 2. The citation further alleges that the respondent violated section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2004)) by causing or allowing the open dumping of waste resulting in open burning. AC at 2. The citation further alleges that the respondent violated section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2004)) by causing or allowing the open dumping of waste resulting in the deposition of general construction or demolition debris or clean construction or demolition debris. AC at 2.

On May 16, 2005, the respondent filed a petition for review (Pet.). The Board accepted the petition for hearing in an order dated May 19, 2005.

On November 2, 2005, Board Hearing Officer Carol Webb conducted a hearing (Tr.) at Champaign City Hall. At the hearing, Special Assistant Attorney General Michelle M. Ryan appeared and participated on behalf of the complainant, and respondent John R. Malloch appeared and participated *pro se*. Two witnesses testified during the hearing: Mr. Mike Mullins of the Agency on behalf of the complainant and John R. Malloch on his own behalf as respondent. Based on her legal judgment, experience, and observations at hearing, Hearing Officer Carol Webb found that both witnesses testified credibly in this matter. Tr. at 15. A single exhibit (Exh. 1), the inspection report dated March 2, 2005, was admitted into evidence at hearing.

On November 30, 2005, the complainant filed its post-hearing brief (Pet. Brief). On December 14, 2005, the respondent filed an answer to filing (Resp. Brief).

FACTS

On March 2, 2005, Agency field inspector Mike Mullins inspected property located near the intersection of roads 600E and 2550N at 2572 County Road 600E near Dewey in Champaign County. Exh. 1 at 6, 7, 9; Tr. at 7. The Agency has employed Mr. Mullins for seven years. Tr. at 5. In a four and one-half year period, Mr. Mullins has performed approximately 400 field inspections for solid waste at facilities such as landfills, open dumps, and salvage yards. Tr. at 6.

The property inspected on March 2, 2005 “is commonly known to the Illinois Environmental Protection Agency as Dewey/Malloch, John R.” and is designated with Site Code

019800500002. Exh. 1 at 1. From the Champaign County Courthouse, Mr. Mullins obtained a deed showing that John R. Malloch owns the site. Tr. at 7.

Mr. Mullins inspected the property on March 2, 2005 to determine its regulatory status and evaluate its compliance with the Act and Board regulations. Exh. 1 at 9. On January 12, 2005, a citizen complained to the Governor's Office of Citizen's Assistance of open dumping, drums floating in a creek, and fluids leaking from vehicles and machinery. *Id.* The Agency's regional office in Champaign received the complaint on February 17, 2005. *Id.*

The site is divided into two sections by a stream or small river. Tr. at 8. The northern part consists of a wooded area surrounded by open farm fields. *Id.* South of the stream or river, the area is "primarily a farm field" with "only a few trees." *Id.* Around the southern part of the site, Mr. Mullins did not observe a fence or any other means of restricting access. Tr. at 8-9.

Mr. Mullins entered the site from road 2550N. Exh. 1 at 9, *see* Exh. 1 at 14 (site map). Mr. Mullins observed smoke on the site north of the 2550N road. Exh. 1 at 9. Walking north toward the smoke, Mr. Mullins encountered the respondent and conducted an informal interview with him. *Id.* The respondent stated that he owned the property and for many years had conducted a recycling business permitted by the county there. *Id.* The respondent further stated that he recycled the following materials: metals from cars; "bumper wraps," or the composite material covering vehicle bumpers; and mobile homes. *Id.* Specifically, the respondent stated that he recovered copper and aluminum from old mobile homes, and Mr. Mullins observed mobile home frames at the site. Exh. 1 at 10.

When Mr. Mullins asked the respondent about the source of the smoke he observed, the respondent indicated "that people dump furniture on the site when he is not there." Exh. 1 at 10. The respondent further stated that he thought a burning sofa caused the smoke. *Id.* As he approached the area of the fire, Mr. Mullins observed smoke coming from a pile of metal that had once possibly been a sofa or other piece of furniture. *Id.*; Tr. at 9; *see* Exh. 1 at 16 (photo 1). Although Mr. Mullins did not see flames there, "the pile was still hot." Exh. 1 at 10. He also observed a cinder block in this area. Tr. at 11.

Adjacent to the burned material, Mr. Mullins observed an area approximately 250 feet in diameter and containing materials including brick, metal, partially burned woods, plastics, "and what appeared to be pink fiber insulation or clothing." Exh. 1 at 10; Tr. at 10; *see also* Exh. 1 at 16 (photo 2). Because he saw mobile home frames to the west of these materials, Mr. Mullins concluded that mobile home salvage occurred in this area. Exh. 1 at 10.

Mr. Mullins also observed "a lot of tires on this site." Tr. at 10; *see* Exh. 1 at 10; Exh. 1 at 17 (photo 3). Mr. Mullins also testified that he observed a motor home that may not have been functional, large metal tanks, a piece of construction equipment, and scrap rusted metals. Tr. at 10. The respondent stated that he removes tires from automobiles that he recycles and then transports those removed tires to another site. Exh. 1 at 10. Mr. Mullins could only observe approximately one-tenth of the site on March 2, 2005, and he did not determine the total number of tires there. *Id.* He did estimate that he photographed 100 tires. Tr. at 11; *see* Exh. 1 at 17 (photo 3).

Mr. Mullins also asked the respondent about handling fluids contained in recycled vehicles. The respondent stated that he transfers gasoline from the vehicles' fuel tanks into drums. Exh. 1 at 10. A person collects the drums for use as fuel in a space heater. *Id.* Mr. Mullins saw "very few automobiles" because the automobile activity appeared to take place in the northern part of the site across a creek. *Id.* at 10-11 *see* Exh. 1 at 14 (site map).

On departing the site, Mr. Mullins observed an area adjacent to the 2550N road at the entrance to the site at which burning had taken place. Exh. 1 at 11, *see* Exh. 1 at 17 (photo 4). That area contained ash, what appeared to be a pallet, and a metal or plastic sink. Tr. at 11.

STATUTORY BACKGROUND

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

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials.

General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste.

* * *

415 ILCS 5/3.160(a) (2004).

Section 3.305 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 landfill." 415 ILCS 5/3.305 (2004).

Section 3.385 of the Act defines "refuse" as "waste." 415 ILCS 5/3.385 (2004).

Section 3.535 of the Act defines "waste" as:

any 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, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in

Section 3.135, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

415 ILCS 5/3.535 (2004).

Section 21(a) of the Act provides that “[n]o person shall [c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a) (2004).

Section 21(p) of the Act provides that no person shall, “in violation of subsection (a) of this Section, cause or allow the open dumping if any waste in a manner which results in any of the following occurrences at the dump site:

- (1) litter
- * * *
- (3) open burning
- * * *
- (7) deposition of:
 - (i) general construction or demolition debris as defined in Section 3.160(a) of this Act; or
 - (ii) clean construction or demolition debris as defined in Section 3.160(b) of this Act.”

415 ILCS 5/21(p) (2004).

Section 31.1(d)(2) of the Act provides that:

“[I]f the Board finds that the person appealing the [administrative] 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) (2004).

Section 42(b)(4-5) of the Act provides that:

“In an administrative citation 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. . . .”

415 ILCS 5/42(b)(4-5) (2004).

ISSUES AND ANALYSIS

“Open Dumping” of “Waste”

In order to prove a violation of any subsection of section 21(p) of the Act (415 ILCS 5/21(p) (2004)), the Agency must prove first that the respondent violated section 21(a) of the Act by causing or allowing the open dumping of any waste. 415 ILCS 5/21(a) (2004).

“Open dumping” means “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 (2004). “Refuse” means “waste,” (415 ILCS 5/3.385 (2004)) and “waste” includes “any garbage . . . or other discarded material” (415 ILCS 5/3.535 (2004)).

The respondent claims “[t]here was no open dumping of waste at this site” (Resp. Brief at 2), but the Board cannot accept this claim. Mr. Mullins’ observations and photographs clearly show the site contained accumulations of materials including metal, brick, plastic, wood, tires, and insulation or other fibrous material. Exh. 1 at 10-11; Tr. at 9-12. The respondent stated that materials originated with cleaning up old farm buildings that had been located at the site. Tr. at 14. Furthermore, the respondent stated that “people dump furniture on the site when he is not there.” Exh. 1 at 10. Because discarded material from one or more sources has been consolidated at the site, and because it has not been disputed that the site does not meet the requirements of a sanitary landfill, the Board concludes that “waste” has been “open dumped” at the site.

“Cause or Allow”

The respondent suggests that he did not cause or allow the open dumping at the site because materials observed there were present when he bought the site in 1970. Tr. at 14. However, the Board has found that a current owner or operator “allowed” litter where the owner or operator did not act to remedy a previous violation. IEPA v. Rawe, AC 92-5, slip op. at 6 (Oct. 16, 1992) (citations omitted). In IEPA v. Goodwin, the Board stated “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).” IEPA v. Goodwin, AC 02-17, slip op. at 4 (July 11, 2002). The Board finds that the respondent has exercised control as owner of the site for 35 years and has caused or allowed the open dumping of the waste observed there on March 2, 2005.

Litter

Although the Act does not define “litter,” the Board has looked to the definition in the Litter Control Act: “[l]itter” means any discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, debris, rubbish . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or

otherwise disposed of improperly.” 415 ILCS 105/3(a) (2004); *see also* St. Clair County v. Louis I. Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991).

The respondent claims that “[w]hat the IEPA calls litter was material from the demolition of buildings” and “was to be picked up by hand and hauled off the site.” Resp. Brief at 1,2. Nonetheless, the record is clear that the site contained discarded materials including metal, brick, plastic, wood, tires, insulation or other fibrous material, and the remains of burning (Exh. 1 at 10-11; Tr. at 9-12) that fall within the definition of “litter” (415 ILCS 105/3(a) (2004)). The Board is not persuaded by the argument that these materials are not litter only because they originated in a building. At the very least, the argument fails to account for the presence of as many as 100 tires. Tr. at 11. The Board is also not persuaded by the apparent argument that the respondent intended to remove the materials from the site, as the record shows that materials constituting litter were present there on March 2, 2005.

Open Burning

The Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2004). The record is clear that Mr. Mullins observed smoke on the site and that he observed a pile of hot smoldering materials including a cinder block, wood, and metal. Exh. 1 at 9-10, 16; Tr. at 9-11. In his response brief, the respondent states that “there was no burning in various piles on the site,” and that “[w]hat the EPA calls . . . open burning was from burning trees that were growing on the site.” Resp. Brief at 2-3. These claims are contradicted by the oral, written, and photographic evidence showing that burning had occurred at the site and that it consumed materials other than landscape waste.

The respondent also argues “the burn pile at the site should not be defined as open dumping as a farmer can spread the ashes on a field.” Resp. Brief at 3. This argument effectively admits that open burning has occurred at the site, and there is furthermore no indication that material in the burn pile is intended for, or being handled consistently with any genuine intention of re-use. *See* IEPA v. Cadwallader, AC 03-13, slip op. at 4 (May 20, 2004).

Construction or Demolition Debris

The Act provides that “general construction or demolition debris” means:

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials. 415 ILCS 5/3.160(a) (2004).

The record shows that the site contained discarded materials including metal, brick, plastic, wood, and insulation or other fibrous material. Exh. 1 at 10-11; Tr. at 9-12. Furthermore, the respondent stated that materials on the site resulted from cleaning up farm buildings that had been located there. Tr. at 14. The respondent states that “[c]onstruction or demolition debris can be found at any site when building clean up is in progress. The materials from the buildings being demolished can legally be hauled off the site by the farmer.” Resp. Brief at 3. Nonetheless, the record shows that material falling under the definition of “general construction or demolition debris” had been open dumped on the site on March 2, 2005.

CONCLUSION

The Board notes the respondent’s claim that “the site is pretty well cleaned up now.” Tr. at 14. However, the Board has stated that “[t]he 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.” IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990). Even when a citation is contested, post-citation clean-up is not material to the Board’s review. Lincoln Chamber of Commerce, AC 89-26, slip op. at 3 (May 25, 1989).

Consequently, the Board finds that the respondent has violated section 21(p)(1), 21(p)(3), and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), (p)(3), and (p)(7) (2004). In its final order, the Board will order him to pay a civil penalty of \$4,500. As set forth below, the Board directs the Clerk and the Agency to document hearing costs and serve them upon the respondent, after which the Board will issue a final order. This interim order constitutes the Board’s interim findings of fact and conclusions of law.

PENALTY

In an administrative citation proceeding, any person found to have violated subsection (p) of section 21 of the Act must pay a penalty of \$1,500 for each violation of each provision of the section and \$3,000 for each violation of each provision that is a second or subsequent offense, plus any hearing costs incurred by the Board and the Agency. 415 ILCS 5/42(b)(4-5) (2004). Because the Board finds that Mr. Malloch has violated three subsections of section 21(p) of the Act (415 ILCS 5/21(p) (2004)) and that these are first offenses, the Board in its final order will order Mr. Malloch to pay a civil penalty of \$4,500 plus costs.

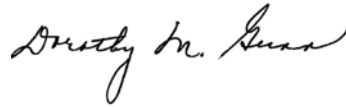
ORDER

1. The Board finds that John R. Malloch violated sections 21(p)(1), 21(p)(3), and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1), 21(p)(3), and 21(p)(7) (2004).
2. The Illinois Environmental Protection Agency must file a statement of its hearing costs within 14 days of this order, on or about March 30, 2006. The statement must be supported by affidavit and served upon Mr. Malloch. Within the same 14-day period, the Clerk of the Illinois Pollution Control Board must also file and serve upon Mr. Malloch a

statement of the Board's hearing costs supported by affidavit. Respondent may file any objections to those statements within 14 days of service, by a date on or about April 13, 2006.

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 March 16, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board