ILLINOIS POLLUTION CONTROL BOARD
January 24, 2008

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 06-49
	)	(IEPA No. 96-06-AC)
MICHAEL GRUEN and JON ERIC GRUEN, d/b/a/ JON'S TREE SERVICE ,	)	(Administrative Citation)
Respondents.	)	

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

PHILLIP H. HAMILTON, FARRELL, HAMILTON & JULIAN, P.C., APPEARED ON BEHALF OF RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

Today the Board finds that respondents, Michael Gruen and Jon Eric Gruen, doing business as Jon's Tree Service (respondents), violated Section 21(p)(1) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) (2006)). The April 20, 2006 violation, which was alleged in an administrative citation issued by complainant, the Illinois Environmental Protection Agency (Agency), took place at a site located at the conjunction of Route 66 and Old Route 66, south of Mount Olive, in Macoupin County. The site is known to the Agency as "Mount Olive/Gruen" and is designated with Site Code No. 1178135010. The Board finds that respondents violated the Act by causing or allowing the open dumping of waste in a manner resulting in litter. As described below, respondents are 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 respondents may respond. After the time periods for the hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

Below, the Board first provides the legal framework for administrative citations. Next, the Board sets forth the procedural history of this case and rules on an offer of proof made at hearing. This is followed by the Board's findings of fact and a summary of the parties' arguments. The Board then discusses the alleged violation and claimed defenses before rendering its legal conclusions.

LEGAL FRAMEWORK

Under the Act (415 ILCS 5 (2006)), 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(c), 42(b)(4), (4-5) (2006); 35 Ill. Adm. Code 108.

The Agency or delegated local authority must serve the administrative citation on the respondent within "60 days after the date of the observed violation." 415 ILCS 5/31.1(b) (2006)); *see also* 35 Ill. Adm. Code 108.202(b). The Agency or delegated local authority also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. *See* 415 ILCS 5/31.1(c) (2006). To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. If the respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(1) (2006); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the administrative citation, but the complainant proves the alleged violations at hearing, the respondent will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500. However, if the Board finds that the respondent "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) (2006); *see also* 35 Ill. Adm. Code 108.500(b).

Because the Act (415 ILCS 5/42(b)(4-5) (2006)) specifies the penalty for a violation in an administrative citation action, the Board cannot consider mitigating or aggravating factors when determining penalty amounts. *See*, *e.g.*, IEPA v. Stutsman, AC 05-70, slip op. at 2 (Sept. 21, 2006). The appellate court in Miller v. PCB, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994), 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, 267 Ill. App. 3d at 167, 642 N.E.2d at 482.

PROCEDURAL MATTERS

Procedural History

On June 2, 2006, the Agency filed the administrative citation. The Agency served the administrative citation on respondent Michael Gruen on the same date. The Agency served the administrative citation on respondent Jon Eric Gruen on June 8, 2006. The Agency site inspection resulting in the citation took place on April 20, 2006. On June 28, 2006, respondents timely filed with the Board a petition to contest the administrative citation. In a July 6, 2006 order, the Board accepted the petition for hearing.

Board Hearing Officer Carol Webb held this case's hearing on March 14, 2007, at the Carlinville City Hall Council Chambers. Two witnesses testified: Agency field inspector Jan Mier and Jon Gruen.[1] Hearing Officer Webb found both witnesses credible. Tr. at 74. The Agency offered one exhibit at hearing, an open dump inspection report dated April 20, 2006, which was admitted into the record.[2]

Respondents offered 43 exhibits at hearing. Exhibits 1-9 are receipts for the sale of firewood by Jon's Tree Service. These transactions took place before the April 20, 2006 inspection, and were admitted into the record. Respondents' Exhibits 10 through 13 are receipts documenting firewood sales by Jon's Tree Service taking place after the Agency inspection; they were not admitted into the record but were accepted as an offer of proof. Respondents' Exhibits 14 through 31, showing the site in July 2006, including a log splitter, tools, and barrels, were not admitted into evidence but were accepted as an offer of proof. Respondents' Exhibits 32 through 43 are vehicle certificates of title and registration and photos, which were admitted for illustrative purposes to assist the Board in reviewing testimony regarding vehicles at the property.[3]

The Agency filed a brief on April 30, 2007, and respondents filed a brief on May 30, 2007.[4]

Offer of Proof

Respondents moved at hearing to enter, as hearing exhibits, four receipts (Resp. Exhs. 10-13) allegedly documenting Jon Gruen's continued sale of firewood and fifteen photos (Resp. Exhs. 14-28) showing timber on respondents' property that allegedly could be used for business purposes. The respondents also moved to enter three photos (Resp. Exhs. 29-31) that included pictures of equipment used in the tree and wood-cutting business and barrels used for burning wood scraps. The Agency objected to the entry of these respondents' exhibits, arguing that the photos and copies of receipts postdate the Agency's site inspection and on that basis are irrelevant to the alleged violation. The photos and copies of receipts were received by the hearing officer as an offer of proof. Tr. at 45-57.

The Agency does not dispute that Jon Gruen has been and is in the business of cutting trees and selling firewood. The record contains, without Agency objection, receipts of firewood sales prior to the inspection date. *See* Resp. Exhs. 1-9. In fact, the Agency's site inspection report notes Jon Gruen's submission of firewood sale receipts to the Agency. *See* Ag. Exh. 1, Narrative at 1. Under the Board's procedural rules, the hearing officer may admit evidence that is "material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs." 35 Ill. Adm. Code 101.626(a). Respondents' receipts and photos postdating the

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[1] The Board cites the hearing transcript as "Tr. at _."

[2] The Board cites the Agency's hearing exhibit as "Ag. Exh. 1 at _."

[3] The Board cites respondents' hearing exhibits as "Resp. Exh. _ at _."

[4] The Board cites the Agency's brief as "Ag. Br. at _" and respondents' brief as "Resp. Br. at _."

inspection were not offered to prove that a cleanup took place after the inspection date, which is generally irrelevant to whether an administrative citation violation has occurred. *See*, *e.g.*, IEPA v. John Brown d/b/a John Brown Painting, AC 04-82, slip op. at 3-4 (May 19, 2005). Rather, these exhibits were offered by respondents to further support the claims that Jon Gruen has an on-going business cutting trees and selling firewood. *See* Resp. Br. at 6-7. On that basis, the Board accepts the offer of proof and enters the exhibits (Resp. Exhs. 10-31) into the record.

FACTS

On April 20, 2006, Mier, an Environmental Protection Specialist with the Agency, inspected a site located at the conjunction of Route 66 and Old Route 66, south of Mount Olive, in Macoupin County, known to the Agency as "Mount Olive/Gruen," designated with Site Code No. 1178135010. Ag. Exh. 1, Checklist at 1; Tr. at 10-11. At the time, the site was owned by respondent Michael Gruen, but was operated by respondent Jon Gruen. The site contained Jon Gruen's office and storage space for his business, "Jon's Tree Service." Ag. Exh. 1, Photos 006, 009, 013; Tr. at 11, 41, 65-66. Specifically, situated on the property were a former motel building and a mobile home, which were used in the business for office space and storing equipment. Tr. at 12, 27-28, 65-66; Ag. Exh. 1, Photos 006, 009, 013.

The April 20, 2006 inspection was the final Agency inspection of the site in a series that began in December 2004. Ag. Exh. 1, Checklist at 1, Narrative at 1; Tr. at 21. The "original deadline date for the Administrative Citation Warning Notice was March 31, 2005." Ag. Exh. 1, Narrative at 1. Four "extensions" were given by the Agency: first until May 31, 2005; second until July 29, 2005; third until December 31, 2005; and finally until March 15, 2006. *Id.* Neither the Administrative Citation Warning Notice nor the extensions were included in the record, and no testimony was provided as to the scope of any directed cleanup. The administrative citation does provide, however, that "Mr. Gruen submitted receipts for firewood he has sold and metal and vehicles he has scrapped." *Id.*

During the April 2006 inspection, Mier observed stacked, cut logs lined along a fence for approximately 250 feet on the west side of the property, as well as stacked, cut logs lined along each side of the site's driveway. Tr. at 13; Ag. Exh. 1, Narrative at 1, Photos 001-003. Portions of the logs collected on the site had begun to deteriorate and crumble and saplings were growing through some of the woodpiles. Tr. at 13-16, 30; Ag. Exh. 1, Narrative at 1, Photos 003, 004, 009, 010. Mier originally estimated that approximately 200 cubic yards of "waste material" was present, but testified that she "vastly underestimated" the amount, revising her estimate to approximately 750 cubic feet of logs in one area of the site. Tr. at 17; Ag. Exh. 1, Checklist at 1.

Jon's Tree Service has been in business since 1996. Tr. at 41. In the business, respondent Jon Gruen "tops" and removes trees, grinds tree stumps, and sells the resulting firewood after processing. Tr. at 41, 44-46; Ag. Exh. 1, Photos 001-005; Resp. Exhs. 1-13, 29-31. "We also deliver chips, mulch, and we also scrap some metal on the side." Tr. at 41 (testimony of Jon Gruen). The estimate of the business' average gross annual income is $75,000, some 20% to 25% of which comes from the sale of firewood. Tr. at 41-42, 46.

Brush from a cut tree is typically chipped at the site where the tree was cut down, though brush was once brought to the Gruen site for later chipping because the chipper equipment was not working. Tr. at 42, 67-68; Ag. Exh. 1, Narrative at 1, Photo 005. Hardwood collected from the tree service work is brought to the Gruen site where it is cut, stacked, seasoned, and split to sell as firewood. Tr. at 42-43, 46, 51, 53. Seasoning or drying out of the wood takes approximately nine months to a year. Tr. at 43. Soft woods from the cut trees, and any woods brought to the site that end up deteriorated so as not to be saleable as firewood, are given to area farmers to burn in their outdoor stoves. Tr. at 42-43. Some of the wood had been on the site for at least approximately 17 months, based on the first and last Agency inspections, and Jon Gruen admitted that some of the wood may have been there for two years. Tr. at 21, 43.

A number of other items were located outside on the property. Approximately 8 to 12 vehicles were on-site, at least five of which required repairs to be operational. Ag. Exh. 1, Narrative at 1, Photos 005, 008, 011, 013; Tr. at 57-61. One vehicle required brakes; another needed a master cylinder; another required freeze plugs; another needed a valve tightened; and another required a new rear end. Tr. at 57-61. Three of the inoperable vehicles were used in the business. Tr. at 57-59, 61. Some of the inoperable vehicles were surrounded by high vegetation. Ag. Exh. 1, Photos 011-013; Tr. at 15-16, 24.

Also present in uncovered truck beds and a recreational boat were piles of unsorted debris, including wire, metal, plastic, mowers, and vehicle parts. Some of these materials had been there since December 2004. Tr. at 16, 26-28, 64-65, 69-70; Ag. Exh. 1, Narrative at 1, Photos 011-013. The piles included scrap metal that Jon Gruen intends to sell. Tr. at 41, 64-65. Jon Gruen has sold scrap metal for approximately $100 per truckload to Mullins Salvage, which is located a few miles from the site. Tr. at 65.

The site also had a large rusted metal tank present for one to two years, a rusted grill with weeds growing through it, and used plastic containers on the ground. Tr. at 15-16, 39; Ag. Exh. 1, Narrative at 1, Photos 006-008. Five drums or barrels are located along the eastern fence. One drum was smoldering and filled with ash. Ag. Exh. 1, Narrative at 1, Photos 006-007; Tr. at 14. Jon Gruen uses the barrels to burn scraps of wood left over from splitting firewood. Tr. at 56-57.

PARTIES' ARGUMENTS

Agency's Arguments

The Agency argues that respondents caused or allowed the "open dumping of waste" at the site based on the presence of:

> materials including cut logs, deteriorated lumber, wood chips, plastic, a rusted metal tank, vehicles, a truck bed full of wood, metal and other materials, and a boat full of plastic, metal scraps, wood, and a used tire. Ag. Br. at 1-2.

The Agency inspector found that the timber, vehicles, scrap metal, "plastic strewn on the ground," tarp, and items in the back of the truck were of an "unsightly or unsanitary nature." *Id.*

at 2, citing Tr. at 34, 39. According to the Agency, the "wood, plastic, rusted metal tank, vehicles, truck bed and boat full of wood, metal, plastic, tire and other materials" constitute "litter" under Section 21(p)(1) of the Act. Ag. Br. at 2.

Inspector Mier estimated that "three-quarters of the waste on site was landscape waste." Ag. Br. at 2. The Agency does not dispute that Jon Gruen intends to use most of the wood he brings back to the site or that he has "used some." *Id.* However, the Agency relies upon its inspector's testimony:

> [I]t's reached a point, though, that there's so much wood on site that it's starting to disintegrate at the bottom of the piles and it would take a long time to get rid of the amount of wood that's there [and some of the wood is] damp, it's ridden with bugs, that type of thing. *Id.* at 4-5, quoting Tr. at 19-21.
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> * * *
>
> [H]e's not using [the wood]. He's let the wood sit for a number of years. Ag. Br. at 5, quoting Tr. at 29.

The Agency argues that a "plan for use of material at some future date is not dispositive in determining whether a material is waste or litter" and that "a person can cause or allow a violation of the Act without knowledge or intent." Ag. Br. at 5. Though the Agency agrees with respondents' counsel that "there is no statutory 'time limit' on a material turning into a waste from neglectful non-use," the Agency argues that "when a person ceases to take care of his materials and allows them to degrade into the environment, then his time has passed." *Id.*

Though Jon Gruen holds title or registration papers for the vehicles on the property (Resp. Exhs. 32-35) and he testified that none of the vehicles have been "deserted" (Tr. at 57-61), the Agency points out that one vehicle needed "brakes put on it" (Tr. at 57), another needed "a master cylinder" (Tr. at 58), one needed "freeze plugs put in it" (Tr. at 59), and another needed "a new rear end" (Tr. at 61). Ag. Br. at 4. Despite Jon Gruen's "intent to make the repairs" needed (Tr. at 59), the Agency continues, "[c]learly, none of these vehicles are currently roadworthy, and apparently haven't been for at least the last year, since the April 20, 2006 inspection." *Id.*

The Agency asserts that by Jon Gruen's own testimony, the truck beds and boat include material that is "unusable." Ag. Br. at 5. Jon Gruen testified that the materials require sorting: "the scrap metal from *the stuff that's not useable*." *Id.*, quoting Tr. at 65 (emphasis added by Agency). Jon Gruen elaborated:

> [A]ll the material that's thrown into the truck bed is not necessarily scrap metal. It's just put there until my son can later go through it and decide *what's valuable and what's not*. Ag. Br. at 5, quoting Tr. at 70 (emphasis added by Agency).

The Agency insists that, "[a]t a minimum, this 'unusable' material is waste, and supports this Administrative Citation." Ag. Br. at 5. The Agency also emphasizes that Jon Gruen intends to

convert the large metal tank into a wood-burning stove (Tr. at 64), but this has not occurred, even though the tank was on the property for "a year or two" (Tr. at 67). Ag. Br. at 4.

Finally, the Agency argues that Michael Gruen is "equally responsible for the violation of Section 21(p)(1) of the Act as is Jon Gruen." Ag. Br. at 6. The Agency states that the Board has long held that:

> present inaction [on] the part of a current landowner to remedy past illegal disposal of waste previously placed on the site constitutes "allowing" open dumping, in that the owner allows the illegal situation to continue. *Id*. at 5-6.

Respondents' Arguments

Respondents argue that the Agency's case is "flawed" because Jon Gruen "uses the items which are the subject of the Complaint in his business, they are not abandoned and they do not constitute 'litter.'" Resp. Br. at 2. The materials have value and have not been disposed of improperly. *Id*. The Agency concedes that there is "no time limit on removal stated in any statute, regulation, or policy of the EPA." *Id*. at 5, citing Tr. at 35. "[T]he import of the state's position," according to respondents, "would be to effectively put Mr. [Jon] Gruen out of business." Resp. Br. at 9.

Respondents state that Jon Gruen's business, Jon's Tree Service, is removing trees; grinding stumps; and selling firewood. Resp. Br. at 5, citing Tr. at 41. In addition, Jon Gruen testified that he delivered wood chips, mulch, and also some scrap metal "on the side." *Id*. Jon Gruen's average yearly gross income from the business is about $75,000, approximately 20% to 25% of which comes from selling cut firewood. Resp. Br. at 5-6, 9, citing Tr. at 46.

After a tree is chopped down, Jon Gruen would typically "chip up all the brush on site." Resp. Br. at 5, citing Tr. at 42. Hardwood is cut and stacked at the Gruen property for seasoning. Resp. Br. at 5-6, citing Tr. at 42. Seasoning takes about nine months to a year. Resp. Br. at 6, citing Tr. at 42. Jon Gruen sells the hardwood as firewood and "the non-reusable soft woods would be given away to farmers in the area who would burn it in their outside wood-burning stoves." Resp. Br. at 5-6, citing Tr. at 42. According to respondents, the Agency concedes that there is no alleged "violation relating to the drums." Resp. Br. at 3, citing Tr. at 22. Further, respondents assert that Inspector Mier "did not dispute [Jon] Gruen's characterization that the drums were used in his business, they were not discarded, and they were not abandoned." Resp. Br. at 3, citing Tr. at 22-23.

Respondents argue that the vehicles at issue do not come within the definition of "litter" because they have not been "abandoned." Resp. Br. at 2. The Illinois Vehicle Code (625 ILCS 5/1-101.05 (2006)) defines an "abandoned vehicle" as:

> any vehicle in a state of disrepair rendering the vehicle incapable of being driven in its condition or any vehicle that has not been moved or used for seven consecutive days or more <u>and</u> is apparently deserted. Resp. Br. at 2 (emphasis added by respondents).

In this case, respondents maintain, the vehicles have been "in the custody and control of Jon Gruen, and they have not been deserted." *Id*. at 2-3. The Agency inspector "did not know whether the vehicles were deserted." *Id*. at 5. Nor does the Agency contest that Jon Gruen "intended to have certain of the vehicles repaired." *Id*. at 4.

Respondents identified 12 vehicles and a boat on the property:

1. A 1987 Chevrolet Caprice, "which still ran, but it needed brakes." Resp. Br. at 7, citing Tr. at 57.
2. A 1985 Chevrolet one-ton dump truck "used in the business which needed a master cylinder, but this was not a complicated repair." *Id*.
3. A 1987 GMC Jimmy four 4-wheel drive truck not owned by Jon Gruen "but [which] was used by one of his workers in the business." Resp. Br. at 7, citing Tr. at 58.
4. A 1985 Dodge van "used to pull trailers full of logs which needed freeze plugs put in it" and Jon Gruen "intended to make the repairs." Resp. Br. at 7, citing Tr. at 58-59.
5. A 1994 Chevrolet one-ton dump truck "used to hold chips in the bed and to pull trailers of logs." Resp. Br. at 7, citing Tr. at 59.
6. A 1974 Chevrolet dump truck "that was used in the business." Resp. Br. at 7, citing Tr. at 60.
7. A 1986 Dodge pickup truck "used in the business to pull trailers and to store tools to keep them out of the weather." Resp. Br. at 8, citing Tr. at 60.
8. A 1991 Chevrolet pickup "used to pull trailers." *Id*.
9. A 1984 Ford one-ton dump truck "used in the tree business for accumulating chips." *Id*.
10. A 1975 Chevrolet flatbed pickup "used in the business." *Id*.
11. A 1981 Chevrolet Camaro not used in the business, "but it was a collectors item and he intended to fix it." *Id*.
12. A 1986 Ford pickup "which needed a new rear end and Respondent intended to repair it." Resp. Br. at 8, citing Tr. at 61
13. A recreational boat. Resp. Br. at 8, citing Tr. at 69.

Respondents summarize that "other than the Camaro, Caprice, and boat, Respondent used all of the vehicles in his business." Resp. Br. at 8, citing Tr. at 61.

According to respondents, the metal tank and scrap material "have a business use, are valuable, and have not been improperly disposed of." Resp. Br. at 3. Jon Gruen intends to convert the metal tank into a wood-burning stove and use it in his business. *Id*. at 4, 8, citing Tr. at 64. Respondents acknowledge that the administrative citation also had "some pictures of some truck beds that contained wire, metal, plastic, mowers and vehicle parts." Resp. Br. at 8. Gruen testified that he "ran across scrap material and that he would accumulate it and sell it." *Id*., citing Tr. at 64. Respondents assert that the "miscellaneous material accumulated as scrap" therefore had a business use and was not abandoned: "there is no reliable evidence to refute

Gruen's testimony that he intends to accumulate it, sort it, and sell it." Resp. Br. at 8, 11, citing Tr. at 65.

DISCUSSION

Alleged Violation

The Agency's administrative citation alleges that respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2006)). 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:
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> 1. litter. 415 ILCS 5/21(p)(1) (2006).

Section 21(a) of the Act, which is referred to in Section 21(p), provides:

> No person shall:
>
> Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2006).

"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 (2006). "Refuse" means "waste." 415 ILCS 5/3.385 (2006). 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 (2006).

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 other packaging construction material, abandoned vehicle (as defined in the Illinois Vehicle Code[5]), motor vehicle parts, furniture, oil, carcass

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[5] The Illinois Vehicle Code defines "abandoned vehicle" as "any vehicle in a state of disrepair rendering the vehicle incapable of being driven in its condition or any vehicle that has not been moved or used for 7 consecutive days or more and is apparently deserted." 625 ILCS 5/1-101.05 (2006).

> of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste as defined in Section 3.360 of the Environmental Protection Act, or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2006).

Wood

The Board finds that the Agency has not met its burden of proving that the wood on the site constitutes the open dumping of waste resulting in litter. The inspection on which the administrative citation is based took place in April 2006. The initial site inspection occurred in December 2004. The logs brought to the site came from Jon's Tree Service for processing and sale as firewood. The logs were cut and stacked for seasoning. The seasoning process takes approximately nine months to a year. Accordingly, that some of the wood had been on-site for roughly 17 months, or even up to two years, is not dispositive to a finding of violation.

Respondents presented numerous receipts documenting the sale of firewood. The business makes 20% to 25% of its $75,000 average gross annual income from such sales. Logs that have degraded on-site are given away by respondent Jon Gruen to area farmers for use in their wood-burning outdoor stoves. The Agency does not allege here that the presence of the burn barrels for scrap wood violates the Act (Tr. at 22) and respondents are not charged with the open dumping of waste resulting in open burning (*see* 415 ILCS 5/21(p)(3) (2006)).

Based on the particular facts of this case, the Board finds the wood on-site as of the April 20, 2006 inspection had not been "discarded" within the meaning of the term "waste" and therefore does not violate Section 21(p)(1) of the Act. *Cf.* IEPA v. Northern Illinois Service Co., AC 05-40, slip op. at 9-10 (Sept. 21, 2006) (Section 21(p)(1) violation found where excavation/demolition business had 9,700 cubic yards of "discarded" landscape debris on-site, some of which had been present for more than ten years, and the company provided no evidence that it had ever processed or planned to process the trees to create mulch), *appeal docketed sub nom.* Northern Illinois Service Co. v. IEPA and PCB, No. 2-07-0213 (2nd Dist. Feb. 28, 2007).

Other Items

The Board does find, however, that the presence of numerous items located outdoors at the property and plainly visible from the site fence constitute the open dumping of waste resulting in litter: inoperable vehicles exhibiting signs of not having been moved for a substantial period of time; a rusted, out-of-use tank and grill; used plastic containers strewn on the ground; and debris piled in truck beds and a boat. With the exception of the plastic containers, respondents argue that these items were not "waste" because they were going to be used and therefore had not been "discarded." Resp. Br. at 2-3. However, respondents' claims of intended future uses are not determinative of whether the materials are waste or litter. *See* County of Sangamon v. Daily, AC 01-16, 01-17 (consol.), slip op. at 10, 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"), *aff'd. sub nom.* Daily v. County of Sangamon and PCB, No. 4-02-0139 (4th Dist. Sept. 18, 2003) (unpublished order under Illinois Supreme Court Rule 23).

Respondents do not contest that several of the vehicles on the site were inoperable. Nor do respondents claim that the vehicles had been out of operation for only a short time as of the inspection date. Instead, respondents assert that some of the vehicles were used in the business, the necessary repairs are relatively minor, Jon Gruen intends to repair certain of the vehicles, and the vehicles had not been "deserted." The repairs needed included adding brakes to a vehicle and providing a new back end for a pickup truck. At the time of the site inspection, some of the vehicles had been inoperable for a sufficient amount of time to allow vegetation to grow up around them. As of the hearing, the vehicles were still inoperable, and a photo showed weeds growing through a truck bed. Tr. at 57-61; Resp. Exh. 43. Respondents gave no indication of when the vehicles would be repaired and put back into use.

Jon Gruen intends to convert the rusted tank into a stove. He admits, however, that the tank had been on-site for one or two years. The tank was outside and not covered, and no timeframe for its conversion was offered. Next to the tank was a rusted grill through which weeds had grown. Used plastic containers were scattered on the ground near these items.

Also present were considerable amounts of plastic and metal debris, which had been collected off-site, brought to the property, and piled into truck beds and a boat, and left uncovered. A used tire was also present. At least some of this material had been on-site since December 2004. Even though Jon Gruen plans to eventually sell the scrap metal at some unstated future time, the metal materials were not sorted for recycling and Jon Gruen concedes that the piles included unusable items. These admittedly unusable items are not valuable, have not been properly disposed of, and will not be "returned to the economic mainstream in the form of raw materials or products." Alternate Fuels, Inc. v. Dir. of IEPA, 215 Ill. 2d 219, 240, 830 N.E.2d 444, 456 (2005) (quoting 415 ILCS 5/3.380).

As set forth above, "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." "Refuse" means "waste." "Waste" includes "discarded material." "Litter," which is not limited to the Illinois Vehicle Code's definition of "abandoned vehicle," may be "any discarded, used or unconsumed substance or waste," including, but 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." *See supra* at 9, 10. In Miller, the court stated:

> A person of common intelligence can understand the term "litter." *** Given its ordinary meaning, "litter" refers to material of little or no value which has not been properly disposed of. The examples of litter set forth in the Litter Control Act [citation omitted] provide additional guidance. Miller, 267 Ill. App. 3d at 168-69, 642 N.E.2d at 483.

Simply asserting an intended use for an item at some unspecified date in the future cannot insulate the item from ever becoming "discarded" or "disposed of," without regard to

how unsightly it is, the manner in which it is kept, and the considerable length of time it has remained deposited. *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"). Moreover, 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).

On this record, the Board cannot find that every one of these items at the property had value, was being handled consistent with legitimate re-use, or was being promptly removed for proper off-site disposal or recycling. *See* IEPA v. Carrico, AC 04-27, slip op. at 7 (Sept. 2, 2004). Further, it is undisputed that the property does not meet the requirements for a sanitary landfill. The Board therefore finds that respondent Jon Gruen, the site operator, has caused the open dumping of waste in a manner resulting in litter.

Owner Liability

Respondent Michael Gruen did not testify at hearing. Respondents do not assert that Michael Gruen exercised no control over the site, that he undertook extensive precautions to prevent the open dumping, or that he does not own the site. *See* People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993); Perkinson v. PCB, 187 Ill. App. 3d 689, 695, 543 N.E.2d 901, 904 (3rd Dist. 1989).

It is undisputed that Michael Gruen is the owner of the property at which Jon Gruen operates. The Board has long held that a landowner who has not acted to remedy a violation has "allowed" litter in violation of the Act. *See*, *e.g.*, IEPA v. Rawe, AC 92-5, slip op. at 6 (Oct. 16, 1992). In these situations, "passive conduct amounts to acquiescence sufficient to find a violation of the Act." IEPA v. M.K. O'Hara, AC 94-96, 94-97 (consol.), slip op. at 6 (Apr. 6, 1995). "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." *Id*. The Board finds that respondent Michael Gruen, the site owner, allowed the open dumping of waste in a manner resulting in litter.

Violation, Civil Penalty, and Hearing Costs

Having found that respondents caused or allowed the open dumping of waste resulting in litter, the Board finds that respondents violated Section 21(p)(1) of the Act. Neither respondent alleges that "the violation resulted from uncontrollable circumstances." 415 ILCS 5/31.1(d)(2) (2006). The Agency seeks the statutory $1,500 civil penalty for the violation. The Agency also requests that respondents pay its hearing costs.

Because respondents violated Section 21(p)(1), the Board now discusses 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 $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) (2006).

There is no indication in the record that this is a second or subsequent adjudicated violation for respondents. Therefore, the civil penalty for respondents' first violation of Section 21(p)(1) is statutorily set at $1,500. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the $1,500 penalty in its final opinion and order.

In addition, by unsuccessfully contesting the administrative citation at hearing, respondents must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2006); 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 respondents. Respondents will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that respondents 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, respondents 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 respondents may respond. After the time periods for the filings on hearing costs have expired, the Board will issue a final opinion and order imposing the civil penalty on respondents and assessing against them any appropriate hearing costs.

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

ORDER

1. Respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2006)).

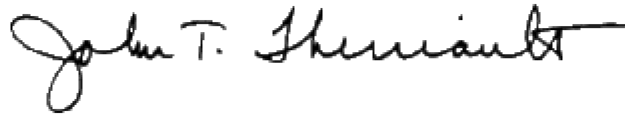
2. By February 22, 2008, the Agency must file a statement of its hearing costs, supported by affidavit. By February 22, 2008, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit.

3. Within 21 days after service of the filings required by paragraph 2 of this order, respondents may file a response challenging the claimed costs.

4. Within 14 days after service of any response permitted under paragraph 3 of this order, the Agency may file a reply to the response.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 24, 2008, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board