

ILLINOIS POLLUTION CONTROL BOARD
May 21, 2009

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	AC 07-30
)	(IEPA No. 375-06-AC)
v.)	(Administrative Citation)
)	
BOBBY G. MYERS and DONALD D.)	
MYERS,)	
)	
Respondents.)	

MICHELLE M. RYAN APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

H. WESLEY WILKINS APPEARED ON BEHALF OF THE RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by G.L. Blankenship):

Today the Board finds that Bobby G. Myers and Donald D. Myers (collectively, respondents) violated Sections 21(p)(1) and (p)(3) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(3) (2006)). The violations, alleged in a citation issued by the Illinois Environmental Protection Agency (Agency), occurred at respondents' property, known to the Agency as Cobden/Myers, Bobby G., *et al.*, and located at 3050 Mt. Glen Road, rural Cobden, Union County. The Board finds that respondents violated the Act by causing or allowing the open dumping of waste resulting in litter and open burning.

After finding the violations in this interim opinion and order, 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 hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

In this interim opinion and order, the Board first describes the administrative citation process, the procedural history, and the facts of this case. The Board then sets forth the pertinent provisions of the Act and summarizes the arguments of the parties as proffered in post-hearing briefs. Next, the Board analyzes the issues and makes its conclusions of law regarding the alleged violations, before then addressing the issue of penalties. Finally, after finding the violation, the Board directs the Agency and the Clerk of the Board to provide hearing costs documentation, to which respondents may respond. After the time periods for the hearing costs filings expire, the Board will issue a final opinion and order assessing the civil penalty and appropriate hearing costs.

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 (AC). 415 ILCS 5/31.1 (2006). The Agency or delegated authority must serve the AC on the respondent within “60 days after the date of the observed violation,” (415 ILCS 5/31.1(b) (2006)) and must file a copy of the AC with the Board no later than ten days after serving the respondent. 415 ILCS 5/31.1(c) (2006). To contest the AC, the respondent must file a petition with the Board no later than 35 days after being served with the AC. If 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)(2) (2006); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the AC, 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. 415 ILCS 5/42(4, 4-5) (2006). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed, (*e.g.* 415 ILCS 5/42(b)(1-3)), Section 42 sets specific penalties for administrative citations. 415 ILCS 5/42(4, 4-5) (2006). Thus, in cases such as this the Board has no authority to consider mitigating or aggravating factors in its determination of 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) (2006)).

PROCEDURAL HISTORY

On January 5, 2007, the Agency timely filed with the Board an administrative citation and served the citation on Bobby G. Myers. The Agency served the citation on Donald D. Myers on January 19, 2007. Respondents filed a timely Petition for Review to contest the citation on February 8, 2007. The Board accepted respondents’ petition on February 15, 2007 and directed the hearing officer to set a hearing date.

On December 4, 2008, Board Hearing Officer Carol Webb conducted a hearing (Tr.) at the Union County Courthouse in Jonesboro, IL. Illinois Special Assistant Attorney General Michelle Ryan appeared on behalf of the Agency. Tr. at 4. H. Wesley Wilkins appeared on behalf of the respondents. *Id.* Hearing Officer Webb determined that the three witnesses that testified at the hearing were credible (Tr. at 42.), and admitted four exhibits into evidence. Tr. at 14, 27, 29, and 40.

On January 5, 2009, the Agency filed a post-hearing brief (Comp. Br.), and on January 29, 2009, the respondents filed their post-hearing brief (Resp. Br.).

FACTS

On December 5, 2006, Agency Field Inspector Garrison Gross inspected Site No. 1818515003, owned by respondents Bobby G. Myers and Donald D. Myers. Citation at 1-2; *see also* Agency Narrative Inspection Report (Field Report) at 1. Mr. Gross performed the inspection as a follow-up to a previous inspection conducted on May 25, 2005. *Id.* During the

inspection, the following items were discovered: waste metal, demolition debris, furniture, domicile waste, tires, tire beads, tire carcasses, approximately 20 waste vehicles, an ostensibly abandoned mobile home, a truck-mounted boom crane, a track hoe, a cutting torch in the flat-bed of a pick-up truck, and several vehicle engines removed from vehicles. Field Report at 1, photos 1-28. Mr. Gross estimated that approximately 2000 tires were scattered throughout the site. *Id.*; *see also* Tr. at 20-21.

The inspection also revealed evidence of opening burning at the site. *Id.* at 1, photos 3-4. Mr. Gross noted that the “derelict” boom crane on site had been observed at the site as early as an inspection conducted on October 28, 1999 (*Id.* at 1, photo 12), and that the mobile home had been observed in a different location than the previous inspection in 2005. Mr. Gross further noted that between the time of the December 2006 field inspection and a subsequent field inspection sometime in 2008 some of the waste vehicles and metal had been removed from the site and the tires had been collected into a large pile. Tr. at 16. Accompanying the AC on January 5, 2007, the Agency filed a Field Report, Open Dump Checklist, and affidavit of Field Inspector Gross.

At hearing, the parties admitted four exhibits into evidence. The Agency admitted Field Inspector Gross’ open dump investigation checklist, dated December 5, 2006, as Complainant’s Exhibit 1; a letter from respondents to Inspector Gross, dated June 28, 2005, as Complainant’s Exhibit 2; and, an AC warning notice sent to the respondents with a file-stamp date of June 16, 2006, as Complainant’s Exhibit 3. The respondents admitted a quitclaim deed pertaining to ownership of the property as Respondents’ Exhibit 1.

SUMMARY OF RESPONDENTS’ TESTIMONY

At hearing, respondent Donald Myers testified to operating an automobile salvage business for forty years at the site. Tr. at 35; *see also* Tr. at 30 (B. Myers direct examination), and Tr. at 22 (Gross cross examination). Donald Myers further testified that “most of the cars [in the field report photographs] has (sic) already been disposed of...junked out, hauled off, [and] sold for scrap,” (Tr. at 36; *see also* Tr. at 16 (Gross cross examination)), and that he and his son (“Junior”) received compensation for them. *Id.*; *see also* Tr. at 20 (Gross cross examination). Donald Myers also testified to fly dumping on site. Tr. at 37; *see also* Tr. at 24 (Gross cross examination).

Respondent Bobby Myers testified that the property was deeded prior to 1989 in equal measure to each of the four children of Paul Brian Myers - himself, Donald Myers, Harold Myers, and Barbara Cerney. Tr. at 30; *see also* Tr. at 38 (D. Myers direct examination); Tr. at 18 (Gross cross examination). Bobby Myers also testified to voluntarily accepting responsibility for paying taxes on the property for approximately 20 years. Tr. at 31. Mr. Myers further testified to having no involvement in the salvage business operated by Donald Myers (Tr. at 30), nor deriving any income from the same. Tr. at 32. Mr. Myers also testified to discussing with Donald Myers about cleaning up the property and personally assuring that clean up would be accomplished. Tr. at 31; *see also* Tr. at 25 (Gross cross examination).

STATUTORY BACKGROUND

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 sanitary landfill.” 415 ILCS 5/3.305 (2006).

Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2006).

Section 3.535 of the Act defines “waste” as:

any garbage, ... 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. . . . 415 ILCS 5/3.535 (2006).

Section 3.300 of the Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2006).

Section 21(a) of the Act states that “[n]o person shall [c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a) (2006).

Section 21(p) of the Act states that no person shall, “[i]n violation of subdivision (a) of this Section, cause or allow the open dumping of of any waste in a manner which results in any of the following occurrences at the dump site:

- 1) litter;

* * *
- 3) open burning;

* * *

The prohibitions specified in this subsection (p) shall be enforceable by the Agency . . . by administrative citation under Section 31.1 of this Act. . . .” 415 ILCS 5/21(p) (2006).

COMPLAINANT’S BRIEF

The Agency believes that open dumping has occurred at the Myers’ property, resulting in litter and open burning in violation of Sections 21(p)(1) and (p)(3) of the Act. In its post-hearing brief, the Agency first defines open dumping and argues that the material found on respondents’ property satisfies that definition. Next, the Agency argues that such open dumping resulted in litter and open burning at the site. The Agency then addresses the respondents’ claims of continued use of the property as an automobile salvage operation, and their stated intent to use much of the waste material on site. The Agency argues that neither an intent to use waste material in the future, nor that the waste material has “value” to the respondents, is dispositive of whether the material is waste. Finally, the Agency addresses respondents’ claims that: (1) only Donald D. Myers should be a named party; and, (2) that the omission of respondents’ siblings as

liable parties constitutes an abuse of discretion by the Agency such that the Board's equity power should be invoked to either attach the non-party siblings or remove Bobby G. Myers as a party to the citation.

Open Dumping of Waste Resulting in Litter and Open Burning

The Agency argues that it has demonstrated the occurrence of open dumping. Comp. Br. at 1-2, citing 415 ILCS 5/3.305 (2006). First, the Agency states that respondents "have been legal owners of the property since 1989," and that respondent Donald D. Myers "has also been an operator of the site for 40 years." *Id.*, citing Tr. at 7, 30, and 35. The Agency then describes the litany of materials on site and argues that the visual evidence in the record, *e.g.*, weather damage, overgrowth of brush surrounding the material, suggests that much of the material has existed in its current state for "a significant period of time." *Id.*

The Agency next argues that respondents' open dumping of waste resulting in litter violates Section 21(p)(1) of the Act. Comp. Br. at 2. The Agency states that "waste vehicles, construction and demolition waste, used tires, furniture, paper, plastic bags, plastic buckets, wood, plastic pipe, a spray tank, a white appliance, and other unidentifiable 'blue' items" constitute litter as determined by previous Board decisions. *Id.* The Agency then argues that respondent Donald D. Myers' intent to use the materials at the site is not dispositive in determining whether a material is waste or litter. *Id.* at 4. The Agency acknowledges respondent Donald Myers' receipt of compensation for some waste vehicles on site, but argues that the fact that these vehicles have value "does not prevent them from being legally defined as waste." *Id.* As proof, the Agency argues that respondents' subsequent disposal of several vehicles after the issuance of the AC supports its determination that those vehicles were waste. *Id.*

The Agency also argues that respondents' open dumping of waste resulting in open burning violates Section 21(p)(3) of the Act. The Agency points to the testimony of Field Inspector Gross at hearing and his photographs of the site as evidence of open burning of landscape waste and over 100 used tires in a burn pit. *Id.* at 3. The Agency argues that respondents' failure to contradict this point at hearing amounts to a tacit admission of open burning. *Id.*

The Agency's Response to Respondents' Procedural Claims

The Agency then discusses respondent Bobby G. Myers' claim that he is an improper party to the administrative citation. The Agency notes the Board's previous decisions regarding the inaction of a current landowner to rectify illegal disposal of waste placed on his land, which state that such inaction constitutes "allowing" open dumping. *Id.* The Agency argues that respondent Bobby G. Myer's testimony as to having "no involvement" in respondent Donald D. Myers' salvage operation is irrelevant to the violations of the Act because he was aware of the operation as early as 1989, and he was aware of the violations as of the summer of 2005. *Id.* At hearing, the Agency admitted into evidence a letter addressed from respondents Bobby G. Myers and Donald D. Myers to the Agency assuring it that "the situation will be corrected," dated June 28, 2005. Tr. at 24-25. The Agency argues that this letter is evidence of respondent Bobby G. Myers' awareness of the violations. Comp. Br. at 3.

Finally, the Agency acknowledges the existence of several additional potentially liable parties to the administrative citation, including Harold Myers and Barbara Cerney, siblings of the two named respondents, and Donald D. Myers' son, identified at hearing as "Junior." *Id.*, citing Tr. at 36. The Agency argues that the strict statutory timeframe for service of an administrative citation "explains why the Agency does not conduct title searches to determine property ownership before issuing citations," and therefore why it did not include Harold Myers, Barbara Cerney, or Junior as parties. The Agency states that respondents Bobby G. and Donald D. Myers' promises to remedy the violations caused them to be named as defendants and argues that "equity does not require the inclusion of Harold Myers and Barbara Cerney..., but even if it did, the Board [does not possess] those powers [under the Act.]" *Id.* at 5.

RESPONDENTS' BRIEF

On January 5, 2009, respondents filed a post-hearing brief (Resp. Br.). In their brief, respondents argue that: (1) the Agency failed to prove they caused or allowed the open dumping of waste in a manner resulting in litter by failing to prove each element of the claim; (2) any burning on site not "open burning" in violation of Section 21(p)(3) of the Act because tires used in a salvage operation are not "waste" as defined under the Act, nor is the burning of landscape waste prohibited by statute; and, (3) the prosecution of respondents alone without the prosecution of three other liable owners/operators is an abuse of discretion that is "arbitrary, capricious, unconscionable, and unjust."

Illinois EPA Failed to Prove the Elements of Section 21(p)(1)

Respondents argue that because the non-waste discarded material has value to their salvage operation, and the remaining waste material was placed on the site by trespassers, which is outside of their ability to control, they did not cause or allow the open dumping of waste. *Id.* at 5.

First, respondents argue that the material found on site is not waste because respondent Donald D. Myers currently operates a "salvage operation" and, therefore, the property "contain[s] what salvage operations do, [sic] namely salvage vehicles, salvage engine parts, salvage tires, . . . and vehicles/equipment clearly used for the purpose of operating a salvage business." Resp. Br. at 3. Respondents acknowledge the "somewhat trashy condition of [their] property," but impliedly argue that the condition of the site is normal for salvage businesses operated in rural areas. *Id.* Respondents also point to Field Inspector Gross' testimony at hearing regarding the removal of several items observed during prior inspections as evidence of an operational salvage business. *Id.* Furthermore, respondents claim that rural salvage businesses "often become unintended open dumps" as a result of uncontrollable fly dumping by trespassors. *Id.* at 4. Respondents again point to Mr. Gross' concurring testimony at hearing as evidence of such activities. *Id.*

Respondents then argue that the Agency correctly cited the appropriate definition of open dumping as the "consolidation of refuse from one or more sources at a disposal site," but incorrectly defined "refuse" as "waste, . . . includ[ing] any *garbage* or *other discarded material*." *Id.* at 4 (emphasis in original). Respondents claim that the Agency's argument is

legally and factually incorrect because there is a distinction between discarded material and “waste.” *Id.* Respondents acknowledge that “old appliance[s,] furniture, discarded household items and construction materials, and the domestic trash and garbage found on their property is, without question, ‘waste’ as used/defined in the statutes.” *Id.* Respondents argue, however, that those items that would more properly be considered “discarded material” - used motor vehicles, vehicle parts, tires, equipment and/or other items collected for salvage, sale and reuse - have “use and value” to the salvage business, and are not, therefore, waste as defined by statute. *Id.*

Finally, respondents conclude that together the distinction between discarded material and waste, in conjunction with their claim of fly dumping, acquits them of the alleged violations. Respondents proffer a definition of litter from the Illinois appellate court whereby the court defined litter as “material of little or no value which has not been properly disposed of.” *Id.* Respondents also return to the testimony of Inspector Gross at hearing in which he stated that several waste items observed in prior inspections had been removed. *Id.* at 6. Respondents also reiterate the argument that rural salvage businesses are often overgrown by trees and grass; materials are often exposed to weather; and that there is no legal requirement otherwise. *Id.*

The Burning of Landscape Waste and Tires Does Not Violate Section 21(p)(3) of the Act.

Respondents proffer “the reasons previously cited [within their brief]” in support of their claim that the tires that were piled and burned were not waste as defined under the Act, and further claim that the open burning of landscape waste does not violate Section 21(p)(3) of the Act. *Id.* at 7. Respondents then ask for the citation to be dismissed with prejudice. *Id.*

The Agency’s Failure to Include Unnamed Liable Parties is an Abuse of Discretion

Respondents state that Bobby G. Myers “had no involvement whatsoever in [Donald D. Myers’] salvage business,” and that he “derived no income from the salvage business, never deposited, nor was ever involved with any of the items placed, found, or removed from the property.” *Id.* at 8. Respondents then argue that if the Board finds that violations did occur, Donald D. Myers should be the sole liable party. Respondents acknowledge that “the failure to name Harold Myers, Barbara Cerney, and/or Donald Myers, Junior, is [not] a defense to the citations issued,” but argue, in the alternative, that the Agency had a “legal and ethical responsibility” to timely amend or refile the citation with the proper parties named. *Id.* at 8-9. Respondents also argue that the Board is responsible for insuring that “the filing, enforcement, and prosecution of . . . administrative citations are conducted in a fair, equitable, and just manner, according to the due process rights of the citizens of Illinois.” *Id.*

DISCUSSION

The Agency alleges that respondents Bobby G. Myers and Donald D. Myers violated Sections 21(p)(1) and (p)(3) of the Act by causing or allowing the open dumping of waste in a manner resulting in litter (415 ILCS 5/21(p)(1) (2006)), and in a manner resulting in open burning (415 ILCS 5/21(p)(3) (2006)). Citation at 2. The Board’s discussion will first address the question of whether respondents did engage in the “open dumping” of “waste” in light of their claims that some of the material is not waste. Next, the Board will examine whether

respondents “caused or allowed” the open dumping of waste in light of their claim that the waste exists as a result of uncontrollable fly dumping. Then the Board will examine whether any open dumping which may have occurred at the site resulted in litter (415 ILCS 5/21(p)(1) (2006)) or open burning (415 ILCS 5/21(p)(7) (2006)). Finally, the Board will address respondents’ claims of abuse of discretion in regards to the IEPA’s failure to name all potential liable parties in the administrative citation.

To prove a violation of any subsection of Section 21(p) of the Act (415 ILCS 5/21(p) (2006)), it must first be proved that the respondents violated Section 21(a) of the Act by causing or allowing the open dumping of any waste. 415 ILCS 5/21(a) (2006).

“Open Dumping” of “Waste”

“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 (2006). Despite respondents’ contentions to the contrary, (Resp. Br. at 4) the Act clearly defines “refuse” as “waste,” (415 ILCS 5/3.385 (2006)) and “waste” as “any garbage . . . or other discarded material.” (415 ILCS 5/3.535 (2006)). Respondents acknowledge that some of the material on site is waste, including the old appliance[s,] furniture, discarded household items and construction materials, and the domestic trash and garbage. Respondents argue, however, that the remaining material is not discarded because it is intended for use in Donald D. Myers’ salvage business.

Respondents’ argument fails for two reasons. First, the Board has repeatedly stated that if at least some of the items consolidated at a site are waste, open dumping has occurred. IEPA v. Stutsman, AC 05-70, slip op. at 7 (Sept. 21, 2006); *see also* IEPA v. Moreton, AC 04-51, slip op. at 7 (February 1, 2007) (“Even assuming that the site contained a portion of valuable material being managed properly for salvage or recycling, the majority of the items consolidated there and identified during the inspection were ‘discarded’ and thus ‘waste’ under the Act.”). Second, the record does not support respondents’ claims as to an active salvage operation. Respondents point to the removal of some discarded material observed during prior site inspections, and to Inspector Gross’ acknowledgment that the site contained machinery that would be useful in such a business, as evidence of an operational salvage business. Resp. Br., at 3. However, the record does not include documentary evidence of an operational salvage business, such as timely receipts of purchase and sale, bills of lading for delivery or removal of material, nor did respondents offer a current license to operate a business issued by the Illinois Secretary of State. Tr. at 22-23.

The record shows that Agency Field Inspector Gross observed and photographed numerous and varied items at the site including tires, furniture, domicile waste, waste vehicles, appliances, an industrial loader that appeared discarded, a non-waste vehicle, an apparently abandoned mobile home, and tire beads, tire carcasses, and tire residue resulting from the burning of approximately 2000 tires. Tr. at 9-13. The field report and photographs reveal that these materials were strewn across the site and overgrown by brush and trees (Field Report, photos 7-12, 14, 18, 21-24), and endured prolonged exposure to the elements. *Id.*, photos 7, 9, 11-13, 15-17, 19-24. In similar factual scenarios, the Board has found that such visual evidence

is proof of a lack of intent to use materials in the future. Stutsman, at 7; *see also* IEPA v. Carrico, AC 04-27, slip op. at 7 (Sept. 2, 2004).

The Board finds that tires, furniture, domicile waste, waste vehicles, appliances, an industrial loader, an apparently abandoned mobile home, and tire beads, tire carcasses, and tire residue constitute “any garbage...or other discarded material,” (415 ILCS 5/3.535 (2006)) and that the respondents have consolidated refuse. Furthermore, it is undisputed that the site does not meet the requirements of a sanitary landfill. Therefore, the Board finds that “waste” has been “open dumped” at the site.

“Cause or Allow”

The Board finds that respondents caused or allowed the open dumping of waste, as a result of their ownership interests in the property and their acknowledgment of violations on the property. The record shows that respondents Bobby G. Myers and Donald D. Myers received part ownership interest in the property at issue from their father before his death in 1989. Tr. at 30; Resp. Exh. 2. Further, the record indicates that respondents assured the Agency that “the situation will be corrected” in a letter signed by both respondents and dated June 28, 2005. Tr. at 26; Pet. Exh. 2. In addition, Bobby Myers’ own testimony states that for more than 20 years he has “voluntarily accepted the responsibility [for] receiving the tax bill and seeing that it was paid.” Tr. at 31.

Respondents’ claims as to the apparent fly dumping of waste on the property by trespassors (Resp. Br. at 4-5) are unavailing as well. The Board has repeatedly stated that a current owner or operator can be found to have “allowed” the open dumping of waste by failing to remove an accumulation of waste for which that person was not initially liable. IEPA v. William Shrum, AC 05-18, slip op. at 8 (March 16, 2006) (stating that “present inaction on the part of a current landowner to remedy past illegal disposal of waste previously placed on [a] site constitutes ‘allowing’ open dumping, [because] the owner allows the illegal situation to continue); Sangamon County v. Lee Hsueh, AC 92-79, slip op. at 4-5 (July 1, 1993). Further, the record indicates that respondents knew of the violations at least 18 months in advance of the December 5, 2006, inspection but did not correct them as promised in the June 2005 letter to the Agency. Tr. at 30; Resp. Exh. 2. For the foregoing reasons, the Board finds that respondents caused or allowed the open dumping of waste as defined under Section 21(a) of the Act.

The Board next addresses the specific provisions of Section 21(p) allegedly violated by the respondents, and finds that the open dumping of waste at the site did result in litter and open burning.

Litter

Although the Act does not define “litter,” previous Board decisions defined litter using the statutory definition in the Illinois Litter Control Act, wherein litter is “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 or an unsightly or unsanitary nature, which has been

discarded, abandoned, or otherwise disposed of improperly.” St. Clair County v. Louis I. Mund, PCB 90-64, (Aug. 22, 1991); *see also* 415 ILCS 105/3(a) (2006).

The record is clear that on December 5, 2006, the site contained discarded materials such as waste metal, demolition debris, furniture, domicile waste, tires, tire beads, tire carcasses, approximately 20 waste vehicles, an ostensibly abandoned mobile home, a truck-mounted boom crane, a track hoe, a cutting torch in the flat-bed of a pick-up truck, and several vehicle engines removed from vehicles. Field Report at 1, photos 1-28; *see also* Tr. at 19-21. Inspector Gross estimated that approximately 2000 tires were scattered throughout the site. *Id.* The Board finds that these materials fall within the definition of “litter” (415 ILCS 105/3(a) (2006)) and that the respondents violated Section 21(p)(1) of the Act.

Open Burning of “Waste”

The Board also finds that respondents violated Section 21(p)(3) of the Act by causing or allowing the open dumping of waste resulting in open burning. 415 ILCS 5/21(p)(3) (2006). Respondents’ claim that the “burning of non-waste material commingled with landscape waste does not violate the Act” (Resp. Br. at 7) directly contradicts the statute’s clear mandate that open burning is the combustion of *any* waste, regardless of its composition. Respondents’ argument implies that landscape waste is exempt under the Board’s open burning regulations. *Id.* However, Board precedent has established that landscape waste is not exempt from Section 21(p)(3). County of Jackson v. Kamarasy, AC 04-63, 04-64 (consolidated), slip op. at 22 (June 16, 2005).

Alternatively, respondents do not deny that landscape waste was burned *along with* other materials (e.g. tires). Instead, they reiterate the argument that because the non-landscape waste material was not “waste” they cannot be found to have caused the open burning of waste. *Id.* Given that the Board found above that such material was “waste,” this second argument fails as well.

“Open burning” is defined by statute as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.300 (2006). “Waste” is defined as “any garbage ...or other discarded material.” (415 ILCS 5/3.535 (2006)), including litter (*supra* at 9). The record shows that the site contained visual evidence of burning, including a burn *pile*, a burn *pit*, tire beads, tire carcasses, and charred tree trunks. Tr. at 10 (emphasis added); Exh. 1, photos 4-7. By burning tires and landscape waste in a burn pit, respondents violated Section 21(p)(3) of the Act.

Allegation of Agency Abuse of Discretion in Issuing the AC to Bobby G. Myers

The Board finds that respondents’ claims of abuse of discretion by the Agency in the issuance of the administrative citation are unavailing. First, Section 108.202 of the Board’s procedural rules states: “in accordance with Section 31.1 of the Act, the Agency...may serve an AC upon *any* person believed, through direct observation, to have violated...subsection (p) of Section 21 of the Act.” 35 Ill. Adm. Code 108.202(a) (emphasis added). Section 31.1 of the Act states, in pertinent part: “whenever Agency personnel, . . . on the basis of direct observation, determine that *any* person has violated any provision of subsection...(p) of Section 21 of this

Act, the Agency...may issue and serve an administrative citation upon such person....” 415 ILCS 5/31.1(b) (2006) (emphasis added). Combined, these provisions clearly state that the Agency may serve an administrative citation upon any person directly observed to be in violation of the Act; however, the provisions do not require that the citation be served upon all persons who may be in violation of the Act. The fact that this citation was served only upon two of four owners does not negate respondents’ violations of the Act, nor does it require the Board to dismiss the citation according to its dismissal powers enumerated in Section 108.402 of the Board’s procedural rules. 35 Ill. Adm. Code 108.402 (2006).

Second, the administrative citation was created by statute with clearly delineated procedures and defenses as a streamlined way in which to enforce the Illinois Environmental Protection Act. *See* 35 Ill. Adm. Code 108.100 - 108.506. Citizens’ due process rights are protected by the strict timeframes both for service of process of the citation on the alleged violator and for filing the citation with the Board, and by the clearly mandated content requirements for each citation. 35 Ill. Adm. Code 108.202, 108.204. Furthermore, the legislature defined narrow parameters for contesting an administrative citation, limited to questions of ownership of the property at issue, whether the alleged violator caused or allowed the alleged violations; whether the citation was timely served; and, whether the alleged violations resulted from uncontrollable circumstances. 35 Ill. Adm. Code 108.206.

Respondents proffered each of these as separate bases for dismissal of this administrative citation. As discussed supra, the Board found that the Agency satisfied its burden of proving that respondents owned the property at issue; that respondents caused or allowed the violations of Section 21(p); that the Agency timely served the administrative citation on respondents and filed the same with the Board; and, that the violations did not occur as the result of uncontrollable circumstances. In the context of an administrative citation, the requirements of due process are satisfied.

CONCLUSION

After reviewing the record in this case and the relevant portions of the Act, the Board finds that the respondents caused or allowed the opening dumping of waste resulting in litter and open burning. Therefore, the Board finds that the respondents have violated Sections 21(p)(1) and 21(p)(3) of the Act. 415 ILCS 5/21(p)(1), (p)(3) (2006). In its final order, the Board will order respondents to pay a civil penalty of \$3,000.00. As set forth below, the Board directs the Clerk and the Agency to document hearing costs and serve them upon respondent, after which the Board will issue a final order. *See* 35 Ill. Adm. Code 108.502, 108.504, 108.506.

This interim opinion and order constitutes the Board’s finding of fact and conclusions of law.

PENALTY

The civil penalty for violating any provision of subsection (p) of Section 21 is \$1,500 per violation, except that the penalty amount is \$3,000 for each violation that is the person’s second or subsequent adjudicated violation of that provision. The Board is also directed to assign

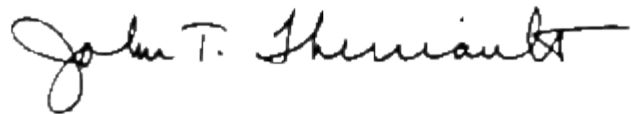
hearing costs incurred by the Board and the Agency to the respondent. 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500(a). Because there are two violations of Section 21(p) and they are respondents' first adjudicated violations, in its final order the Board will order Bobby G. Myers and Donald D. Myers to pay a civil penalty of \$3,000.00 plus costs.

ORDER

1. The Board finds that Bobby G. Myers and Donald D. Myers violated Sections 21 (p)(1) and (p)(3) of the Act.
2. The Illinois Environmental Protection Agency must file a statement of its hearing costs within 30 days of this order, on or before June 22, 2009, the first business day after the 30th day after this order. The statement must be supported by affidavit and served upon respondents. 35 Ill. Adm. Code 108.502. Within the same 30-day period, the Clerk of the Illinois Pollution Control Board must also file and serve upon respondents a statement of the Board's hearing costs supported by affidavit. See 35 Ill. Adm. Code 108.504, 108.506(a).
3. Respondent may file any objections to those statements within 21 days of service of those statements, by a date on or about Monday, July 13, 2009. 35 Ill. Adm. Code 108.506(a). The Agency may then file a reply to the respondent's response within 14 days of service of that response. 35 Ill. Adm. Code 108.506(b).
4. The Board will then issue a final order assessing a statutory penalty of \$3,000.00 for the violations and awarding appropriate hearing costs. 35 Ill Adm. Code 108.500(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on May 21, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board