ILLINOIS POLLUTION CONTROL BOARD
April 15, 2010

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 09-56
	)	(IEPA No. 139-09-AC)
GARY J. and JAMES R. SZCZEBLEWSKI,	)	(Administrative Citation)
Respondents.	)	

MICHELLE RYAN APPEARED ON BEHALF OF THE COMPLAINANT; and.

GARY SZCZEBLEWSKI APPEARED ON BEHALF OF RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by G.T. Girard):

The Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against Gary J. and James R. Szczeblewski (respondents) alleging that respondents violated Sections 21(p)(1) and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2008)). The administrative citation was issued for alleged violations occurring at a facility located at 402 East Yung Road, Sesser, Franklin County. For the reasons discussed below, the Board finds that respondents violated Sections (p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2008)) and that a fine of $3,000 must be assessed. Further, the Agency and the Board are directed to file statements of hearing costs within 14 days of this order so that those costs may be assessed against respondents.

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 (2008). The Agency, or a unit of local government which is a delegated authority by the Agency, must serve the AC on the respondent within “60 days after the date of the observed violation,” (415

ILCS 5/31.1(b) (2008)) 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) (2008). 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) (2008); 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)(2008). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed, (*e.g.* 415 ILCS 5/42(b)(1-3) (2008)), Section 42 sets specific penalties for administrative citations. 415 ILCS 5/42(4, 4-5) (2008). 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) (2008).

PROCEDURAL HISTORY

On June 29, 2009, the Agency timely filed an administrative citation against Gary J. and James R. Szczeblewski. On August 3, 2009, respondents filed a petition (Pet.) to contest the administrative citation on the basis that respondents did not cause or have control of the problems at the property. Pet. at 1. In the alternative, respondents claim that the results of the alleged violations are uncontrollable circumstances that occurred without the consent of respondents. *Id*. The Board accepted the petition for review on August 6, 2009.

A hearing was held before Board Hearing Officer Carol Webb on November 4, 2009 (Tr.). At that hearing Ms. Maggie Stevenson, an inspector with the Agency, Ms. Robyn Hammonds, secretary and office manager at Gary Szczeblewski Law Office, and Mr. James Szczeblewski testified. Tr. at 7, 51, 58. The hearing officer set a schedule for filing briefs, requiring the Agency to file a brief by December 8, 2009, and a reply, if any, by January 19, 2010. Tr. at 63. The hearing officer directed respondents to file a brief by January 11, 2010. *Id*.

The Agency timely filed a brief (Br.) that the Board received on December 8, 2009. The January 7, 2010 Hearing Officer Order granted respondents' request for additional time to file a post-hearing brief, requiring respondents to file a brief by February 11, 2010 and complainant to file a reply by February 19, 2010. The February 16, 2010 Hearing Officer Order again granted respondents' request for additional time to file a post-hearing brief, requiring respondents to file a brief by February 19, 2010 and complainant to file a reply by February 26, 2010. Respondents filed a Post Hearing Brief (Resp. Br.) on February 19, 2010. The Agency timely filed a reply (Reply Br.) on February 25, 2010.

FACTS

Respondents own and operate a facility located in Franklin County known to the Agency as Sesser/Szczeblewski, Gary J. and James R. Property and designated with Side Code No. 0550455034. AC at 1. The facility is an open dump operating without a permit. *Id.* On June 11, 2009, Ms. Stevenson inspected the site. *Id.*; Tr. at 7.

Ms. Stevenson inspected the site because of a citizen complaint regarding possible open dumping on the site. Tr. at 29. Upon her arrival, Ms. Stevenson found the gate to the property open. Tr. at 8, Exh. 1 at 3. Ms. Stevenson observed materials that appeared to be disposed of at the site, despite the overgrowth of weeds and vegetation. Tr. at 8-11, Exh. 1 at 3-4. The materials consisted of metals, shingles, construction/demolition debris, furniture, burned debris, and general refuse. *Id*. Ms. Stevenson also noted that open burning had occurred at the site and was noted during the previous inspection. Tr. at 9, Exh. 1 at 3.

Ms. Stevenson took twelve pictures. Tr. at 7-11, Exh. 1 at 1-11. The photos show materials such as a tire, cement blocks, roofing materials, lumber, a partial child's bed and slide, two deteriorated steel drums, a cigarette sorter container, a plastic tarp, metal debris, siding, a ceramic toilet, a couch, some drywall and some miscellaneous debris. Tr. at 8-9, Exh 1-11. The photos also show the area where the open burning had occurred. Tr. at 9.

Summary Of Exhibits And Testimony

At hearing, Ms. Stevenson testified on behalf of the Agency. Tr. at 4-50. Ms. Hammonds and Mr. Jim Szczeblewski testified for respondents. Tr. at 50-62. The Board first describes the exhibits and offers of proof submitted during the hearing. The Board then summarizes the testimony.

Exhibits and Offers of Proof

At hearing, the parties admitted four exhibits into evidence and two offers of proof. Tr. at 11, 43-44, 63. The Agency admitted Field Inspector Stevenson's Inspection Report dated June 11, 2009, as Complainant's Exhibit 1 (Exh. 1). Tr. at 11. The June 11, 2009 inspection includes the open dump inspection checklist showing which sections of the Act were found in violation, a narrative inspection report, and photographs of the inspection with descriptions. Exh. 1. The Agency also admitted the administrative citation warning notice (ACWN) sent to respondents dated April 16, 2009, as Complainant's Exhibit 2 (Exh. 2). Tr. at 43-44. As indicated on the ACWN, the purpose of the ACWN was to inform respondents of the violations found during the initial inspection conducted on March 31, 2009. Exh. 2. The ACWN also details the necessary corrective actions and responses to be completed and submitted, and notes that the Agency may file an AC for any violations of Section 21(p) of the Act. *Id.*

In addition, the Agency admitted a letter from respondents to complainant dated April 30, 2009, as Complainant's Exhibit 3 (Exh. 3). Tr. at 43-44. In the April 30, 2009 letter, respondents stated that the violations should be directed to the Illinois Department of Natural Resources Abandoned Mined Lands Reclamation Program (AML). Exh. 3. The Agency also

admitted a letter from complainant to respondents dated May 27, 2009, as Complainant's Exhibit 4 (Exh. 4). Tr. at 43-44. In the May 27, 2009 letter, the Agency responded that the AML program has no relevance to the open dumping on the property. Exh. 4. The Agency also stated that the corrective actions required by the April 16, 2009 letter (ACWN) need to be completed by the May 31, 2009 deadline, which could be extended by a written request submitted with a clean-up plan. *Id*.

Respondents submitted as an offer of proof a photo of construction debris. Tr. at 35. According to respondents, the photo was a still picture from a newsreel showing the use of construction debris at Sessor Lake property. Tr. at 32. Respondents also offered a news article pertaining to construction debris in general. Tr. at 62-63. These exhibits were not admitted, but were accepted as offers of proof. *Id*.

Testimony Related to Notice

During Ms. Stevenson's cross-examination, Mr. Gary Szczeblewski stated that respondents were given until May 31, 2009 to comply with the first inspection, and the second inspection was conducted without notice to respondents. *Id*. at 22. Mr. Gary Szczeblewski was concerned that the Agency did not ask respondents to address the problems found during the second inspection before the AC was "sent to the Pollution Control Board." *Id*. at 22-24.

Ms. Stevenson testified that the Agency sent respondents the ACWN resulting from the first inspection to give respondents notice that the Agency had inspected the property and found open dumping, and gave respondents the chance to comply with the Act without further action. *Id*. at 42. Ms. Stevenson also testified that she received a response dated April 30, 2009, and the Agency responded with a letter dated May 27, 2009 which stated that respondents still need complete their corrective actions by May 31, 2009. *Id*. at 42-43.

Ms. Stevenson testified that during a phone conversation on or around May 28, 2009, the Agency granted respondents a verbal extension to comply with the first inspection conditioned on respondents sending the extension request in writing by June 3, 2009. *Id*. at 26. According to Ms. Stevenson's testimony, because respondents did not send the written request for an extension, Ms. Stevenson did a follow-up inspection which was subsequently filed with the Board. *Id*. Ms. Stevenson testified that the Agency did not receive a written request for the extension of the May 31, 2009 deadline. *Id*. at 43.

At hearing, Ms. Hammonds testified that the May 27, 2009 letter from the Agency, received by respondents on May 28, 2009, indicated that the site was to be cleaned up pursuant to the first inspection by May 31, 2009. Tr. at 51. Ms. Hammonds stated that she contacted Ms. Stevenson to ask how they were supposed to comply in three days, and asked to speak with someone else. *Id*. at 52. Ms. Stevenson transferred the call to Mr. Tom Edmondson. *Id*. Ms. Hammonds testified that Mr. Edmonson said that he would give respondents a 30 day extension, and that they would set up a camera on the property to see "who ha[d] been... doing the open dumping." *Id*. at 53. Ms. Hammonds stated that neither Ms. Stevenson nor Mr. Edmonsdson told her to file a written request for the extension. *Id*. at 53-54.

Ms. Hammonds further testified that the extension was until July 31, 2009, and that respondents received the AC on June 29, 2009, prior to the July 31, 2009 deadline. *Id*. at 54-55. On cross-examination, Ms. Hammonds testified that respondents did not provide a clean up plan as requested by the AC and that the site was not in fact cleaned up by July 31, 2009. *Id*. at 56.

Testimony Related to Respondents' Concern of Politics

During cross-examination, Ms. Stevenson also testified that the citizen's complaint was filed by the mayor of Sesser, Mr. Ned Mitchell. *Id*. at 29[1]. Ms. Stevenson also testified that she was not aware that Mr. Mitchell was running for mayor against Gary Szczeblewski at the time the complaint was filed, and that she was only concerned with the inspection of open dumping conducted pursuant to the citizen's complaint. *Id*. at 30-32.

Testimony Related to Security at the Property

At hearing, Ms. Stevenson testified that the gate was open when she arrived on June 11, 2009 for the inspection. Tr. at 8. In addition, Mr. Jim Szczeblewski testified that he had installed gates at the entrance of the property to protect a grain bin, which he eventually moved off-site. *Id*. at 59-62. Mr. Jim Szczeblewski stated that people cut the locks off a number of times, and that he did not authorize or allow people to dump their debris. *Id*.

Further, Mr. Jim Szczeblewski testified that some of the debris had been there when he purchased the property about 20 years ago. *Id*. at 60-61. According to Mr. Jim Szczeblewski, the open dumping had been happening continuously since respondents purchased the property, perhaps over 50 years. *Id*.

Testimony Related to Respondents' Reference to AML

As mentioned, Respondents' initial response to the ACWN as stated in the April 30, 2009 letter to the Agency was to direct violations to the AML program. Exh. 3. The Agency responded that the AML was not applicable to open dumping violations. Exh 4. In addition, Ms. Stevenson testified that she was not aware or concerned with the fact that the property may have at one point been a coal mine site. Tr. at 14-16. Ms. Stevenson stated that whether this area was a coal mine site was not relevant to the open dumping inspection. *Id*. at 16.

Testimony Related to Respondents' Offers of Proof

Ms. Stevenson testified that a news media channel contacted the Agency about possible open dumping at Sesser Lake. *Id*. at 32. Ms. Stevenson testified that she and her regional manager determined that the photos provided by the news channel showed rip rap for the lake rather than open dumping of waste. *Id*. Further, Ms. Stevenson testified that the Illinois Department of Natural Resources allows you to use clean construction debris, as seen in the photo, as rip rap to stabilize bank areas around lakes and ponds. *Id*. at 35. Ms. Stevenson noted

[1] Ms. Stevenson misstated Mr. Mitchell's first name during the hearing as 'Fred.' Tr. at 29. Mr. Mitchell's name is Ned Mitchell.

that this use of clean construction debris is governed by the IDNR, not by the Agency. *Id*. These photos were submitted as offers of proof. *Id*. at 64.

Testimony Related to Right-of-Way

In Mr. Szczeblewski's opening statement at hearing, he questioned whether the debris is located on the Sesser/Szczeblewski, Gary J. and James R. Property, or the Burlington Northern Railroad right-of-way. Tr. at 4. The narrative site description of the June 11, 2009 inspection noted that it was unknown at the time of inspection if the waste is also being dumped on the railroad right-of-way property. Exh. 1. Ms. Stevenson testified that because the distance from the railroad tracks to the debris had not been measured, she was unable to state whether the debris was located on the right-of-way in addition to respondents' property. Tr. at 12. She further stated that the waste was not in fact located in the right-of-way. *Id*.

STATUTORY BACKGROUND

Section 21(p) of the Act prohibits any person from causing or allowing open dumping in a manner which results in the following occurrences at the dump site:

> (1) litter;
> ***
> (7) deposition of general construction or demolition debris as defined in Section 3.160(a) of this Act; or clean construction or demolition debris as defined in Section 3.160(b) of this Act. 415 ILCS 5/21(p)(1), (7) (2008).

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 (2008). Section 3.385 of the Act defines "refuse" as "waste." 415 ILCS 5/3.385 (2008). Section 3.53 of the Act defines "waste" as, among other things, "garbage . . . or other discarded material . . . ." 415 ILCS 5/3.53 (2008).

It is well established that the Board accepts the definition of litter as that found in the Litter Control Act. St. Clair County v. Louis I. Mund, AC 90-64 (Aug. 22, 1991). Section 3 of the Illinois Litter Control Act provides:

> "Litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly. 415 ILCS 105/3(a) (2008).

Section 3.160(a) 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 or other 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) (2008).

Section 3.160(b) defines "clean construction debris" as:

> uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities . . . . 415 ILCS 5/3.160(b) (2008).

Section 31.1 of the Act allows the respondent to appeal the County's issuance of an administrative citation within 35 days of the service of the administrative citation. 415 ILCS 5/31.1 (2008). Under Section 31.1(d)(2) of the Act, if the Board finds that the violations occurred and were not the result of uncontrollable circumstances, the Board must enter an order finding the violation and assessing the statutory penalty. 415 ILCS 5/31.1(d)(2) (2008). Statutory penalties for administrative citations are set in the Act, and the Board has no leeway to consider mitigating or aggravating factors in determining penalty amounts. *See* 415 ILCS 5.42(b)(4-5) (2008).

AGENCY'S ARGUMENTS

The Agency argues that respondents violated Sections 21(p)(1) and (7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2008)) by causing or allowing the open dumping of waste resulting in litter and the deposition of clean or general construction or demolition debris. Br. at 1. Specifically, the Agency asserts that the respondents, who owned the property for approximately twenty years, testified that the dumping has been continuing for more than fifty years. Br. at 1-2; Tr. at 61-63. Therefore, according to the Agency, respondents caused or allowed the open dumping of waste observed on June 11, 2009. Br. at 2.

More specifically, the Agency notes that the Board uses the definition of "litter" found in the Litter Control Act (415 ILCS 105/3(a) (2008)) and according to the definition and supporting case law, the tire, cement block or cinder block, roofing material, dimensional lumber, a child's bed, a child's plastic slide, a cigarette sorter from a store, deteriorated steel drums, plastic tarp, a toilet, a couch, drywall and other miscellaneous items constitute litter. Br. at 2. Because these items were all observed at the site, the Agency asserts that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2008)). *Id.*

The Agency also notes that the definition of construction or demolition debris as defined by the Act (415 ILCS 5/3.160(a) (2008)) includes the cement block or cinder block, roofing material and drywall at the site. Br. at 3. The Agency further notes that dimensional lumber qualifies as construction or demolition debris under the Act. *Id*., citing IEPA v. Yocum, AC 01-29 and 01-30 (consld.) (June 6, 2002); aff'd in an unpublished order as Yocum v. PCB, 4-02-0107 (June 20, 2003). Therefore, the Agency argues, respondents violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2008)). Br. at 3.

The Agency notes that the respondents admitted that some of the waste observed at the site was present since before they owned the property. Br. at 3, Tr. at 60-63. The Agency asserts that inaction on the part of a current landowner to remedy past illegal disposal of waste previously placed on the site constitutes "allowing" open dumping. Br. at 3, citing IEPA v. William Shrum, AC 05-18 (March 16, 2006); Sangamon County v. Lee Hsueh, AC 92-79 (July 1, 1993).

The Agency also states that the access gates to the property were unlocked at the time of inspection. Br. at 3-4. The Agency notes that respondents had previously provided locks, but someone had cut them off to steal items from the respondents' grain bin, and respondents moved the grain bin but had not maintained the locks. Br. at 4, citing Tr. at 60-61. The Agency asserts that "[r]espondents had abandoned any attempt to secure the site by the time of the June 2009 inspection." *Id*. According to the Agency, the respondents therefore did not take reasonable steps to secure the site against additional open dumping. *Id*.

As to respondents' claim that they "were given no notice of [the Administrative Citation], we were not asked to solve the problem… [the Agency] didn't give us the opportunity to do anything," (Tr. at 23), the Agency asserts that the Administrative Citation Warning Notice (ACWN) dated April 16, 2009 provided such notice. Br. at 4. The Agency notes that by the time of the June 11, 2009 inspection, the site conditions indicated that the respondents were not going to clean up the site within the given time frame, and respondents' written response to the ACWN did not indicate that they intended to clean up the site. Br. at 4-5.

In response to respondents' confusion about the deadline for remediation of the site, the Agency draws attention to Exhibits 2 and 4, indicating the deadline of May 31, 2009. Br. at 5, Exh. 2, 4. The Agency further notes that Exhibit 4 required requests for extensions of the deadline to be in writing. Br. at 5, Exh. 4. The Agency asserts that respondents' confusion is unacceptable in part because one of the respondents is lawyer. *Id*. The Agency also notes that respondents' witness claimed the deadline according to the phone call was July 31, 2009, but that respondents had not cleaned up the waste by their presumptive deadline of July 31, 2009. *Id*. The Agency argues that respondents cannot "now claim surprise at the issuance of an Administrative Citation." *Id*.

Finally, the Agency argues that the additional defenses offered by respondents are without merit. Br. at 6. In response to respondents' defense that the property is controlled by the Illinois Department of Natural Resources Abandoned Mined Lands Reclamation Program (AML), the Agency asserts that the AC does not address mine waste and that the AML would not address the waste noted in the AC. *Id*. In response to respondents' defense that "small town politics" are involved (Tr. at 49, 53), the Agency's reports are based solely on the inspections of the property. Br. at 6. In response to respondents' defense that the waste is on the railroad right-of-way (Tr. at 5), the Agency's witness testified that this claim was not accurate. Br. at 6, citing Tr. at 13.

RESPONDENTS' ARGUMENTS

Respondents indicate that they relied on the revised deadline of July 31, 2009, to comply with the AC, and were therefore "unable to give information to [rebut]… due to the fact a complaint had been filed with the Board." Resp. Br. at 7.

Respondents also claim that the Agency did not comply with the enforcement provisions of the Act (415 ILCS 5/31 (2008)), which, according to respondents, sets forth the procedure that the Agency should follow in filing a complaint with the Board. *Id*. Respondents argue that the the enforcement provisions (415 ILCS 5/31 (2008)) do not include a requirement that an extension for compliance with an AC be in writing. *Id*.

Respondents further assert that the Agency's Marion Regional Office was "paying back political favors." *Id*. According to the respondents, the Illinois Assistant Attorney General was "totally disregarding the Act." *Id*.; *see* Resp. Br. at 6.

Finally, respondents request that the matter be remanded to the Agency's Marion Regional Office to be properly consolidated with the original complaint. Resp. Br. at 8.

AGENCY'S REPLY

The Agency first argues that some of respondents' factual assertions are either not of record or contradict the evidence in the record of this case. Reply Br. at 1-4. The Agency then argues respondents' claims related to the legal insufficiencies of the Agency's actions are without merit. *Id*. at 4-5. Finally, the Agency addresses respondents' concern with the political favors. *Id*. at 5.

Regarding respondents' allegedly inappropriate factual assertions, the Agency notes that the Board makes its decision "based on the record," and it is therefore important to note that these assertions are unsupported. *Id*., citing 415 ILCS 5/31.1(d)(2) (2008). First, the Agency argues that respondents' reference to a "second complaint having been filed with the IEPA by the complainant Ned Mitchell" is unsupported. *Id*. at 2, citing Resp. Br. at 2. Next, the Agency addresses respondents' claim that July 31, 2009 was the agreed extension date for compliance with the ACWN. *Id*. at 2. The Agency asserts that this claim is inconsistent with both written evidence (Exh. 2 and 4) and testimony admitted (Tr. at 50). *Id*.

The Agency then asserts that respondents' discussion regarding "individual trespassing on this abandoned coal mine site and the need for a meeting between the parties" is not supported in the record. *Id*. at 3, citing Resp. Br. at 4-5. The Agency argued further that when respondents attempted to elicit this alleged discussion during testimony, the hearing officer sustained the Agency's hearsay objection. *Id*., citing Tr. at 55. Next, the Agency argues that respondents' claim that they "would have objected also to the informal nature of the complaint" is ambiguous. *Id*., citing Resp. Br. at 6. According to the Agency, respondents did not clarify to which complaint they were referring, and in addition, the record does not demonstrate that any of the possible complaints, including the citizen's complaint, the June 11, 2009 inspection report, or the AC, could be considered informal. *Id*. Finally, the Agency argues that the respondents'

claim that they were "unable to give information to rebuttal (*sic*) or request a meeting due to the fact a complaint had been filed to (sic) the Board" is not supported by the record and contradicts respondents' arguments. *Id*. at 3-4, citing Resp. Br. at 7.

Regarding respondents' issues of law, the Agency first addresses respondents' claim that the Agency failed to follow the procedural requirements of the Act, referring to "Title VIII Enforcement… Section 31(a)(2)" (415 ILCS 5/31(a)(2) (2008)). Reply Br. at 4, citing Resp. Br. at 7. The Agency argues that this is a misunderstanding of the applicable law, and asserts that according to Section 31(f) (415 ILCS 5/31(f) (2008), AC actions are governed by Section 31.1 (415 ILCS 5/31.1 (2008)). Reply Br. at 4.

Next, the Agency argues that respondents' request for relief is "unintelligible." *Id*. The Agency notes that respondents' use the terms "informal (second)" and "original" complaint without clarification. *Id*. Further, the Agency argues that respondents' request to remand the informal (second) complaint to the Marion Regional Office and to order "the director of the… [o]ffice… to resolve the conflict in an amicable manner pursuant to the Act" is not within the Board's authority in AC cases. *Id*., citing 415 ILCS 5/31.1(d)(2) (2008); 35 Ill. Adm. Code 108.500.

Regarding respondents' reference to political favors, the Agency asserts that there is no support in the record for this claim. Reply Br. at 5. The Agency also notes that there is no evidence to support respondents' statement that an Agency representative manifested any inappropriate intent or disregard for the law. *Id*.

DISCUSSION

The Agency alleges that respondents violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing the open dumping of waste in a manner resulting in litter (415 ILCS 5/21(p)(1) (2008)), and in a manner resulting in the deposition of general or clean construction and demolition debris (415 ILCS 5/21(p)(7) (2008)). AC at 2. The Board's discussion will first address respondents' alleged defenses. The Board will then examine whether respondents engaged in the "open dumping" of "waste," and whether respondents "caused or allowed" the open dumping of waste. The Board will then determine whether the open dumping resulted in litter and the deposition of general or clean construction and demolition debris.

First, the Board discusses respondents' alleged defenses extracted from respondents' post-hearing brief. The Board also addresses respondents' comment on trespassing raised in their reply brief. Finally, the Board acknowledges the only two statutory defenses that can properly be used to deny an administrative citation.

Respondents' Defenses

In summary, respondents' purported defenses to the alleged violations are that (1) they relied on the revised deadline of July 31, 2009 to comply with the ACWN but were served with the AC prior to the deadline, (2) the Agency did not comply with the enforcement provision of

the Act (415 ILCS 5/31 (2008)), and (3) the Agency was "paying back political favors." Resp. Br. at 7-8.

The Board notes that respondents have raised general defenses that are without citation to authority and that are based on facts without citation to the record, some of which are not found in the record at all. Under Section 101.504 of the Board's rules, facts asserted that are not part of the record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109). 35 Ill. Adm. Code 101.504. As the Board is required to make its decision based on the record (415 ILCS 5/341.1(d)(2) (2008)), new facts unsupported in the record are not considered in the Board's decision.

Although not clearly anunciated, respondents appear to argue that the Agency is estopped from pursuing the administrative citations because the alleged violations are based on an unannounced follow-up inspection conducted before respondents' anticipated deadline of July 31, 2009. Resp. Br. at 6-7. Respondents assert that an Agency representative granted an extension of the deadline for cleaning up the site until July 31, 2009, and that they relied on the July 31, 2009 deadline for compliance with the April 16, 2009 ACWN but were served with the AC prior to the deadline. *Id*. at 7, Tr. at 22-24. In addition, according to respondents' testimony, respondents spoke with an Agency representative on May 28, 2009 and received a 30-day extension. Tr. at 55. Respondents' witness also testified that the deadline was extended until July 31, 2009. *Id*. Respondents also assert that when they received the deadline extension verbally, the Agency representative did not advise respondents to provide a written request for the extension as well. Resp. Br. at 7, Tr. at 53-54, 57. The Agency argues that a deadline extension for compliance with an ACWN must be submitted in writing, and that respondents were aware of the written requirement. Reply Br. at 2, Tr. at 26, 50, Exh. 2.

The Board has held that "the doctrine of estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another." County of Sangamon v. Everett Daily, AC 01-16, slip op. at 14-15 (Jan. 10, 2002); People v. John Crane, Inc., PCB 01-76, slip op. at 9 (May 17, 2001). "[T]he application of equitable estoppel against a public body is generally disfavored and should not be invoked except in rare and unusual circumstances, but the doctrine may be applied where, under all facts and circumstances, . . . it would be inequitable or unjust to permit [the public body] to negate what it has done or permitted to be done. In the Matter of: Pielet Brothers' Trading Inc., AC 88-51, slip op. at 16 (Jul. 13, 1989), citing Ponton v. Illinois State Board of Education, 62 Ill. App. 3d 907, 909, 379 N.E.2d 1277, 1278 (1st Dist. 1978). In Crane, the Board held that, "parties seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result . . . [a] party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue." Crane, PCB 01-76, slip op. at 9.

In Pielet Brothers, respondent was a landfill owner and operator, and has submitted a permit application for operation in a new area of the landfill. Pielet Brothers, AC 88-51, slip op. at 2-5. While finalizing the permit, respondent undertook activities pursuant to the pending permit with the Agency's approval. *Id*. at 4-5. The Agency subsequently found respondent in violation of a number of provisions of the Act, but the Board held that the Agency was estopped

from the violations related to the aforementioned activities because "the record reveals that the Agency, through its representatives, make representation to Pielet Brothers upon which Pielet Brothers could reasonably have believed and allowed it to [undertake activities in violation of the operating permit.]" *Id*. at 15-20.

Here, respondents' arguments are not persuasive. Respondents' witness testified to two different deadlines, a 30-day extension granted on May 28, 2009 and a revised deadline of July 31, 2009. Further, respondents' claim that the extension request was granted without a requirement that the request be submitted in writing conflicts with the record. *Compare* Tr. at 55, 56 *and* Exh. 4. Unlike the respondent in Pielet Brothers, respondents' claims here are not supported by the record. The record supports the Agency's claims that the written requirement was communicated to respondents. *See* Exh. 4, Tr. at 27, 50. Respondents have failed to demonstrate that the Agency knowingly made a misrepresentation to respondents. Because the record supports the Agency's assertions, the Board finds that respondents' reliance on an extended deadline is misplaced.

Respondents' brief also states that the Agency did not follow the procedure as required by the Act in enforcing the administrative citation under the enforcement provisions (415 ILCS 5/31 (2008)). Resp. Br. at 6-7. Section 31(f), however, clarifies that the provisions to which respondents refer shall not apply to administrative citation actions commenced under Section 31.1 of the Act. 415 ILCS 5/31(f) (2008). More importantly, the AC served on respondents identifies that the Agency has the authority to issue the AC pursuant to Section 31.1 of the Act (415 ILCS 5/31.1 (2008)). AC at 1. In addition, the ACWN dated April 16, 2009, directed respondents to Sections 21(a) and (p) of the Act (415 ILCS 5/21(a), (p) (2008)), which references Section 31.1 of the Act (415 ILCS 5/31.1 (2008)). Exh. 2. The record indicates that the Agency has in fact followed the procedure outlined for enforcement of administrative citations. AC at 1-4, Tr. at 41-44, Exh. 1, 2, 4. Therefore respondents claim that the Agency has not followed the appropriate procedure is misplaced.

Respondents final argument is that the Agency was "paying back political favors" rather than remedying the violation. Resp. Br. at 7. Respondents have not provided any evidence to support this argument. Further, the Agency's actions are based only on the inspection. Tr. at 30-32. Accordingly, the Board will not consider respondents' argument in its decision.

In addition, in respondents' reply brief, respondents refer to a discussion with an Agency representative regarding "individual trespassing" on the site. Resp. Br. at 4-5. The discussion was referenced in respondents' reply brief without citation to the record (*Id*.) and was not mentioned during the hearing or in any of the exhibits. The Board is required to make its decision based on the record (415 ILCS 5/31.1(d)(2) (2008)), and because the assertion is not not supported by the record, the Board will not consider the issue in its decision.

Even if the discussion had been supported by testimony or evidence, the Board notes that the Agency's authority to enter private property at reasonable times for the purpose of inspecting and investigating to ascertain possible violations of the Act is subject only to constitutional limitations. 415 ILCS 5/4(d)(1) (2008). A party seeking suppression of evidence on the basis of invasion of privacy has the burden of showing that an unreasonable search occurred. Miller v.

IPCB, 267 Ill.App.3d 160, 169, 642 N.E.2d 475, 483 (4th Dist. 1994); County of Jackson v. Alvin Valdez and Ruben J. Valdez, AC 09-09 (Apr. 16, 2009); County of Jackson v. Kamarasy, PCB 04-64, slip. op. at 58 (Jun. 16, 2005). In this case, respondents do not meet the burden of showing that they had a reasonable expectation of privacy.

Further, as the Board has observed in IEPA v. Bobby G. Myers and Donald D. Myers, AC 07-30, slip op. at 29-30 (May 21, 2009):

> 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 *et seq.* 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.

The only statutory defense to an administrative citation is the violations were a result of uncontrollable substances (*see* IEPA v. John Groff, AC 05-20 (Oct. 20, 2005)). The only other defense is that the violations did not occur (*see* IEPA v. Omer Thomas, AC 89-215 (Jan. 23, 1992)). The Board has consistently held that without one of these two defenses, a violation must be found. *See e.g.*, IEPA v. Bencie, AC 04-77 (Feb. 16, 2006); *see also* 35 Ill. Adm. Code 108.206. Respondents have not asserted that the violations were a result of uncontrollable circumstances or that the violations did not occur. The Board therefore holds that respondents are without a defense.

To prove a violation of any subsection of Section 21(p) of the Act (415 IPCS 5/21(p) (2008)), it must first be proved that respondents violated Section 21(a) of the Act by causing or allowing the open dumping of any waste. 415 ILCS 5/21(a) (2008).

"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 (2008). The Act defines "refuse" as "waste," (415 ILCS 5/3.385 (2008)) and "waste" as "any garbage. . . or other discarded material" (415 ILCS 5/3.535 (2008)). Respondents do not contest the Agency's allegations that the materials observed at the site, including a tire, cement blocks, roofing materials, lumber, a partial child's bed and slide, two deteriorated steel drums, a cigarette sorter container, a plastic tarp, metal debris, siding, a ceramic toilet, a couch, some drywall and some miscellaneous debris, are waste.

Therefore the Board finds that the materials observed at the site on June 11, 2009 constitute "any garbage. . . or other discarded material" (415 ILCS 5/3.535 (2008)) and that 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"

Having found that waste has been open dumped at the site, the Board next looks to the evidence in the record to determine if respondents' cause or allowed the open dumping of the waste. To establish that respondents caused or allowed open dumping, complainant may merely establish the "[p]resent inaction on the part of the landowner to remedy the disposal of waste that was previously placed on the site. . ." IEPA v. Rawe, AC 92-05, slip. op. at 6 (Oct. 16, 1992). Here, respondents do not dispute that they are owners of the property. Respondents concede that some of the waste observed at the site was present prior to their ownership. Tr. at 60-63. The Board therefore finds that respondents exercised control of the site and have caused or allowed the open dumping of waste, which the Agency observed there on June 11, 2009.

Further, Respondents' claim that the waste disposal was uncontrollable circumstances that occurred without the consent of respondents (Pet. at 1) is unavailing. 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. Bobby G. Myers and Donald D. Myers, AC 07-30, slip. op. at 24; William Shrum, AC 05-18, slip. op. at 8; Lee Hsueh, AC 92-79, slip. op. at 4-5. Accordingly, the Board finds that respondents caused or allowed the open dumping of waste as defined in Section 21(a) of the Act.

Litter

The Board next looks to the evidence in the record to determine if respondents' open dumping led to litter being present at the site. 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, unconsumed substance or waste. 'Litter' may include, but is not limited to, any garbage. . . debris. . . or anything else of an unsightly or unsanitary nature, which has been. . . disposed of improperly." Louis I. Mund, PCB 90-64; *see also* 415 ILCS 105/3(a) (2008).

The pictures and testimony from the Agency establish that a tire, cement blocks, roofing materials, lumber, a partial child's bed and slide, two deteriorated steel drums, a cigarette sorter container, a plastic tarp, metal debris, siding, a ceramic toilet, a couch, some drywall and some miscellaneous debris were all present at the site on June 11, 2009. Tr. at 8-11; Exh. 1. The Board finds that these materials fall within the definition of "litter" (415 ILCS 105/3(a) (2008)) and that respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2008)).

Deposition of Construction Debris

Having found that respondents open dumped waste, the Board next looks to the evidence in the record to determine if respondents' open dumping led to the deposition of general or clean construction or demolition debris at the site. General construction and demolition debris

includes "uncontaminated materials resulting from the construction, remodeling, repair and demolition of utilities, structures and roads, limited to the following: . . . concrete and other masonry materials; wood, including non-hazardous painted, treated and coated wood. . .; . . . drywall;. . . plumbing fixtures. . .; roofing shingles and other roof coverings. . ." 415 ILCS 5/3.160(a) (2008). Clean construction debris includes "uncontaminated broken concrete. . ." 415 ILCS 5/3.160(b).

Pictorial evidence and testimony firmly establish that cinder block or cement block, dimensional lumber, roofing materials, metal debris, siding, a ceramic toilet and some drywall were present at the site on June 11, 2009. Tr. at 8-11; Exh. 1. Respondents did not dispute the presence of the waste or the Agency's classification of the material as waste. Therefore the Board finds that respondents open dumping resulted in the deposition of general or clean construction or demolition debris.

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 open dumping of waste resulting in litter and the unlawful deposition of construction or demolition debris. Therefore, the Board finds that respondents violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2008)).

The civil penalty for violating Section 21(p) of the Act (415 ILCS 5/21(p) (2008)) is $1,500 for a first offense and $3,000 for a second or subsequent offense, plus hearing costs. 415 ILCS 5/42(b)(4-5) (2008); 35 Ill. Adm. Code 108.500(a). Because there are two violations of Section 21(p) of the Act (415 ILCS 5/21(p) (2008)) and these violations are the first offense, based on the record, the total civil penalty is $3,000. Further, because a hearing was held in this proceeding, respondents are also liable for hearing costs. Therefore, the Board and the Agency must file a statement of costs with the Clerk within 14 days of this order.

This interim opinion constitutes the Board's findings of fact and conclusions of law. A final order will be issued pursuant to the interim order that follows

ORDER

1. The Board finds that respondents Mr. Gary J. Szczeblewski and Mr. Jim R. Szczeblewski violated Sections 21(p)(1) and (p)(7) of the Environmental Protection Act (415 ILCS 5/21(p)(1), (7) (2008)) at property located in Sesser, Franklin County.

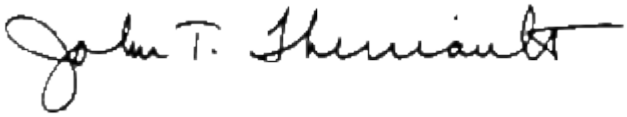
2. The Illinois Environmental Protection Agency and the Clerk of the Board must each file a statement of their respective hearing costs within 14 days of the date of this order, or by April 29, 2010. Each statement must be supported by affidavit and served on Mr. Gary J. Szczeblewski and Mr. Jim R. Szczeblewski.

3. The Board gives Mr. Gary J. Szczeblewski and Mr. Jim R. Szczeblewski leave to respond to the statements of hearing costs ordered in paragraph 2 of this order within 21 days after service of that information. 35 Ill. Adm. Code 108.506(a). The Agency may then file a reply to Mr. Gary J. Szczeblewski and Mr. Jim R. Szczeblewski's response within 14 days after service of the response. 35 Ill. Adm. Code 108.506(b).

4. The Board will then issue a final order assessing a statutory penalty of $3,000 for the violations and awarding appropriate hearing costs. 35 Ill. Adm. Code 108.500 (b).

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 15, 2010, by a vote of 5-0



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board