

ILLINOIS POLLUTION CONTROL BOARD  
July 7, 2011

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 11-26
	)	(IEPA No. 100-11-AC)
ESTATE OF KENNETH D. BERHENKE,	)	(Administrative Citation)
	)	
Respondents.	)	

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

On May 12, 2011, the Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against the estate of Kenneth D. Berhenke (Berhenke). *See* 415 ILCS 5/31.1(c) (2010); 35 Ill. Adm. Code 101.300(b), 108.202(c). The administrative citation concerns Berhenke’s private property located at 10012 92nd Avenue West in rural Andalusia, Rock Island County. The property is commonly known to the Agency as the “Berhenke, Mike” site and is designated with Site Code No. 1618005002. For the reasons below, the Board accepts Berhenke’s amended petition as timely filed, but directs Berhenke to file a second amended petition.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2010)), 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. *See* 415 ILCS 5/21(o), 21(p), 22.51, 22.51a, 31.1(c), 42(b)(4), 42(b)(4-5), 55(k) (2010); 35 Ill. Adm. Code 108.

In this case, the Agency alleges that on March 16, 2011, Berhenke violated Sections 21(p)(1), 21(p)(7), and 55(k)(1) of the Act (415 ILCS 5/21(p)(1), 21(p)(7), and 55(k)(1) (2010)) by: 1) causing or allowing the open dumping of waste in a manner resulting in litter, 2) causing or allowing the open dumping of waste in a manner resulting in deposition of general or clean construction or demolition debris, and 3) causing or allowing the open dumping of waste in a manner resulting in the collection of used tires, not altered, covered, or otherwise prevented from accumulating water, at the Rock Island County site. The Agency asks the Board to impose on Berhenke the statutory \$1,500.00 civil penalty for each alleged violation, for a total civil penalty of \$4,500.00.

On June 6, 2011, Berhenke timely filed a petition. *See* 415 ILCS 5/31.1(d) (2010); 35 Ill. Adm. Code 101.300(b), 108.204(b). On June 16, 2011, the Board accepted the petition as timely filed but found that the petition contained deficiencies that prevented the Board from accepting the case for hearing. First, the Board found that the petition was deficient under the Board’s

procedural rules because the petition failed to list Berhenke's grounds for appeal. See 35 Ill. Adm. Code 108.206. Second, there was no evidence that Berhenke served the Agency with a copy of the petition as required. 35 Ill. Adm. Code 101.304. Finally, the petition did not clearly state the grounds upon which it was made, nor did it offer a concise statement of the position or relief sought. 35 Ill. Adm. Code 101.504. The Board directed Berhenke to correct these deficiencies by filing an amended petition on or before July 18, 2011.

On June 24, 2011, Berhenke timely filed an amended petition (Am. Pet.) contesting the administrative citation. See 415 ILCS 5/31.1(d) (2010); 35 Ill. Adm. Code 101.300(b), 108.204(b). In the amended petition, Berhenke cured the petition's deficiency with respect to filing service on the Agency. See 35 Ill. Adm. Code 101.304. The amended petition, however, still contains several deficiencies.

In the amended petition, Berhenke alleges that "[w]e have pulled tires out" and that rain and lack of funds continue to delay cleanup. Am. Pet. at 1. The Board observes, however, that in an administrative citation proceeding, voluntary cleanup performed by a respondent after a site inspection is generally neither a defense to the alleged violation nor relevant in determining the civil penalty amount. See, e.g., IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990). Thus, the Board finds that Berhenke's amended petition fails to adequately state the grounds for appeal. See 35 Ill. Adm. Code 108.206. Additionally, the amended petition does not clearly state the grounds upon which the petition is made, nor does it offer a concise statement of the position or relief sought. See 35 Ill. Adm. Code 101.504. Finally, the amended petition is signed by Michael J. Berhenke, who does not appear to be an attorney. When appearing before the Board, any person other than an individual "must appear through an attorney-at-law licensed and registered to practice law." 35 Ill. Adm. Code 101.400(a)(2). As the Estate of Kenneth D. Berhenke is a person other than an individual, the amended petition must be filed by an attorney-at-law.

Under these circumstances, the Board directs Berhenke to file a second amended petition through an attorney by August 8, 2011, which is the first business day following the 30th day after the date of this order. See, e.g., County of Jackson v. Dan Kimmel, AC 06-21 (Feb. 16, 2006) (accepting as timely filed a petition that failed to include grounds for appeal but requiring an amended petition to cure the deficiency). The second amended petition must clearly state one or more acceptable grounds for contesting the administrative citation. 35 Ill. Adm. Code 108.206. The second amended petition must also clearly state the relief the Berhenke is seeking. 35 Ill. Adm. Code 101.504. Finally, the second amended petition must be filed by a licensed attorney-at-law. 35 Ill. Adm. Code 101.400(a)(2).

If Berhenke fails to file a second amended petition in accordance with this order, the Board will dismiss the petition and enter a default order against Berhenke, finding the violations alleged and imposing the corresponding \$4,500 civil penalty. IEPA v. John and Debra Watson, AC 11-18 (June 16, 2011) (dismissing deficient petition and finding violation); see also Ray Logsdon Estate, AC 05-54 (Apr. 21, 2005) (finding respondent defaulted by not filing an amended petition as directed to cure the deficiency in the original petition).

If Berhenke proceeds to contest the administrative citation but does not prevail on the merits of this case, Berhenke may have to pay not only the \$4,500 civil penalty, but also any hearing costs of the Board and the Agency. A schedule of the Board's hearing costs is available from the Clerk of the Board and on the Board's Web site at [www.ipcb.state.il.us](http://www.ipcb.state.il.us). See 35 Ill. Adm. Code 108.504.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 7, 2011, by a vote of 5-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board