

ILLINOIS POLLUTION CONTROL BOARD
July 26, 2012

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 11-28
)	(IEPA No. 125-11-AC)
THAD SHAFER,)	(Administrative Citation)
)	
Respondent.)	

MICHELLE RYAN, ASSISTANT COUNSEL, APPEARED ON BEHALF OF
COMPLAINANT, and

THAD SHAFER APPEARED ON HIS OWN BEHALF.

INTERIM OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On June 7, 2011, the Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against Thad and Linda Shafer. *See* 415 ILCS 5/31.1(c) (2010); 35 Ill. Adm. Code 101.300(b), 108.202(c). Linda Shafer was dismissed shortly afterward, leaving Thad Shafer as the sole respondent (Shafer or respondent).

The administrative citation concerns respondent's property located at 984 U.S. Route 40, Jewett, Cumberland County. The property is commonly known to the Agency as the "Jewett/Shafer" site, and is designated with Site Code No. 0350105004 (site). For the reasons discussed below, the Board finds that respondent Thad Shafer violated sections 21(p)(1) and 21(p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) and 21(p)(7) (2010)) by causing or allowing the open dumping of waste resulting in litter, and the deposition of construction or demolition debris.

In this interim opinion and order, the Board first describes the administrative citation process, followed by procedural history and facts of this case. The Board then sets forth the pertinent provisions of the Act. Next, the arguments of the parties are summarized as presented at hearing, in respondent's amended petition for review, and in the Agency and respondent's post-hearing briefs. The Board then summarizes the alleged violations, before addressing the issue of penalties. Finally, after finding violations, the Board directs the Agency and the Clerk of the Board to provide hearing costs documentation, to which respondent 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.

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the Agency and units of local government to enforce specified provisions of the Act through an administrative citation. 415 ILCS 5/31.1 (2010). The Agency or delegated authority must serve the administrative citation on the respondents within “60 days after the date of the observed violation” (415 ILCS 5/31.1(b) (2010)), and must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. 415 ILCS 5/31.1(c) (2010). 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)(2) (2010); 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. 415 ILCS 5/42(b)(4-5) (2010). Unlike other environmental enforcement proceedings in which only a maximum penalty is prescribed (*e.g.* 415 ILCS 5/42(b)(1-3) (2010)), Section 42 sets specific penalties for administrative citations. 415 ILCS 5/42(b)(4, 4-5) (2010). Thus, in cases such as this the Board has no authority to consider mitigating or aggravating factors in the Board’s 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) (2010).

PROCEDURAL HISTORY

On June 7, 2011, the Agency timely filed an administrative citation against respondent Thad Shafer and Linda Shafer. The Agency served the administrative citation on Thad Shafer on June 3, 2011. On June 20, 2011, Thad Shafer timely filed a letter construed as a petition for review. In response to a July 7, 2011 Board order, Thad Shafer filed an amended petition for review (Am. Pet.) on August 2, 2011 to cure certain deficiencies in the initial petition for review. On August 18, 2011, the Board accepted Thad Shafer’s amended petition for review, and directed the Agency to file proof of service on Linda Shafer. On September 22, 2011, the Board granted the Agency’s September 8, 2011 motion to voluntarily dismiss Linda Shafer, leaving Thad Shafer as the sole respondent.

On March 27, 2012, Board hearing officer Carol Webb conducted a hearing at the Cumberland County Courthouse, Toledo, Cumberland County. As reflected in the hearing transcript (Tr.), attorney Michelle Ryan appeared on behalf of the Agency. Tr. at 2. Respondent appeared *pro se*. At the hearing, Dustin Burger, a field inspector for the Agency, testified for complainant. Tr. at 6-24. Respondent testified on his own behalf. Tr. at 25-26.

Pursuant to the schedule established by the hearing officer, on April 16, 2012, the Agency timely filed a post-hearing brief (Comp. Brief). On May 4, 2012, respondent timely filed his post-hearing brief¹ (Resp. Brief).

FACTS AS ALLEGED IN THE PLEADINGS

Administrative Citation

The administrative citation filed by the Agency on June 7, 2011 (AC) describes the conditions observed during an April 7, 2011 site inspection. Agency field inspector Dustin Burger inspected Thad Shafer's property (site), and prepared a Narrative Inspection Report to describe his observations (Insp. Rep.). Mr. Burger attached to his report a United States Department of Agriculture site overview obtained through Google, and three digital photos he took of the site that day. AC at 1; Insp. Rep. Mr. Burger related that "the dump site was discovered when Wil Mathews from Jewett burned a house trailer in town and dumped the remaining debris at the property owned by his Aunt Linda Shafer." Insp. Rep. at 1; Tr. at 11.

Mr. Burger states that the site is a rural field surrounded by forested hills. Insp. Rep. at 1. Mr. Burger had dealings with Mr. Mathews regarding cleanup of the site from October through December 2010. *Id.* Mr. Burger stated that Mr. Mathews was issued a ticket for open dumping by a conservation police officer, and that the Agency had issued administrative citation warning notices (ACWNs) to both Mr. Mathews and the owner of the house trailer. *Id.* Mr. Mathews reported to the inspector that Mr. Mathews had cleaned up the materials he himself had dumped but was not responsible for the other material that remained. *Id.*

Mr. Burger re-inspected the site on December 30, 2010. Insp. Rep. at 1. On the second inspection, Mr. Burger found a "considerable amount of household waste" that had been concealed underneath the materials dumped by Mr. Mathews. *Id.* This pile contained "garbage bags with household waste including mail with the name and address of Thad Shafer . . . tin cans, plastic, empty containers, and food wrappers" along with "some demolition debris remaining from the trailer demolition, including lumber and carpet." *Id.*, *see also* photos 1-2.

After this December 2010 inspection, Mr. Burger sent a warning notice on January 19, 2011 to respondent and Mr. Mathews requiring them to clean the site by March 15, 2011. Insp. Rep. at 1.; Tr. at 21-22. On April 7, 2011, Mr. Burger inspected the site again, about three weeks after the deadline set in the ACWN. Mr. Burger stated that he arrived at 11:30 a.m. and knocked on respondent's door, but there was no answer. Insp. Rep. at 1-2. Mr. Burger said he found the area "essentially the same" as on his December 30th inspection, and it appeared that no waste had been either added or removed from the area. Insp. Rep. at 2. But, Mr. Burger reported that he noticed additional waste that was spread downhill from the main pile. *Id.*, *see also* photo 3.

¹ Respondent's brief was timely filed because it was postmarked on or before the filing deadline. *See* 35 Ill. Adm. Code 101.300 (b)(2).

Amended Petition

On August 2, 2011, Thad Shafer filed the amended petition that the Board accepted for hearing on August 8, 2011. In that amended petition, Mr. Shafer stated that he had not received any notice of Mr. Burger's April 2011 and December 2010 visits, and claimed that all visits were illegal searches prohibited by the Fourth Amendment to the United States Constitution. Am. Pet. at 1. He denied causing or allowing open dumping, which was caused by Mr. Mathews without his knowledge. *Id.* Thad Shafer denied any connection with or knowledge of any "Linda Shafer." *Id.* at 1-2. Mr. Shafer challenged the nature and amount of material that had been dumped, and stated that it had all been cleaned up, and appended a photograph of the site. Am. Pet. at 2-3.

Mr. Shafer concludes that:

This case is a mole hill being made into a mountain. As I stated earlier, every single farm in the U.S.A. has a place where the farmer burns things. Why am I being singled out? I've only owned this farm for 2-3 years and that scrap pile has been there for years and I'm the one that has paid to have it cleaned up - see picture enclosed. I'm hoping this case will be dismissed in the near future. Am. Pet. at 3.

TESTIMONY PRESENTED AT HEARING

At hearing, the Agency was represented by attorney Michelle Ryan and respondent Thad Shafer appeared *pro se*. Agency inspector Dustin Burger testified on behalf of the Agency. Mr. Burger testified as to his qualifications and the facts in his inspection report, establishing a foundation for three photographs entered into the record. Tr. at 6-10. The substance of that testimony will not be repeated here; Mr. Burger then answered questions posed by Mr. Shafer.

During cross-examination, Mr. Burger testified that the reason the Agency originally included Linda Shafer in the citation was because Wilmer Mathews, who had originally dumped material on respondent's site, had mentioned Linda Shafer as one of the property owners. Tr. at 11, 17. However, Mr. Burger did not actually know whether she existed or not. Tr. at 11. When respondent questioned Mr. Burger about why he was able to inspect property without a warrant, Mr. Burger testified that he was able to inspect property pursuant to Section 4 of the Act. Tr. at 12, referencing 415 ILCS 5/4(d) (2010). Mr. Burger also testified that Wilmer Mathews was cited for open dumping for his contributions to the waste at the site. Tr. at 12, 17.

In response to questions regarding the 60 day service requirement, Mr. Burger testified that it is not Agency policy to issue a citation after the first observed violation. The Agency prefers to give violaters a chance to clean up their property first, rather than having the Agency start out as the "bad guy." Tr. at 16. According to Mr. Burger, this was the reason the Agency chose to cite Shafer only for the April 7, 2011 violation, as opposed to citing him for the violations observed during Mr. Burger's two previous inspections. Tr. at 16.

Thad Shafer testified on his own behalf. Tr. at 25-26. He stated that the original observed violation was on September 29, 2011, which was beyond the 60 day service requirement and that he was not notified of the alleged violation by the Agency until much later. Tr. at 25. He also testified that it was impossible to clean up a burn pile that had been there for about 80 years especially during the wintertime, as it requires a backhoe. Tr. at 25. He also pointed out that he did later clean up the pile and that he had only owned the property for about 3 years. Tr. at 25. He also alleged that Mr. Burger violated the U.S. Constitution by inspecting his property without a warrant, “where even the Illinois State Police and the FBI need a warrant in order to search property”. Tr. at 25.

STATUTORY CONSTITUTIONAL AND PROVISIONS

The Act

Alleged Violations of Section 21

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) (2010). Section 21(p) of the Act states that 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:

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

The prohibitions specified in this subsection (p) shall be enforceable . . . by administrative citation under Section 31.1 of this Act. 415 ILCS 5/21(p) (2010).

The Act’s Definitions

Section 3.05 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 (2010). Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2010). “Waste” includes “any garbage . . . or other discarded material.” 415 ILCS 5/3.535 (2010).

The Act does not define “litter” but the Board generally relies on the Litter Control Act, which defines “litter” as:

any discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, debris, rubbish . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2010); *see St. Clair County v. Louis I. Mund*, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991).

Section 3.160(a) of the Act defines “general construction or demolition debris” as follows:

non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials. 415 ILCS 5/3.160(a) (2010).

Section 3.160(b) of the Act defines “clean construction or demolition debris” as “uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt pavement, or soil generated from construction or demolition activities.” 415 ILCS 5/3.160(b) (2010).

The Act’s Investigation or “Search” Provision

Section 4(d) of the Act states that,

In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:

- (1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/4(d) (2010).

Administrative Citation Procedures

Section 31.1(b) of the Act allows the Agency to issue an administrative citation after observing a violation of the Act but the Agency must “issue and serve an administrative citation upon such person within not more than 60 days after the date of the observed violation.”

Section 31.1(d)(2) of the Act states, in part, that:

If, based on the record, the Board finds that the alleged violation occurred, it shall adopt a final order which shall include the administrative citation and findings of

violation as alleged in the citation, and shall impose the penalty specified in subdivision (b)(4) or (b)(4-5) of Section 42. However, if the Board finds that the person appealing the 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) (2010).

This section also states that “the burden of proof shall be on the agency.” *Id.*

Administrative Citation Penalties

Section 42(b)(4-5) of the Act states, in part, that “in an administrative citation under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of \$1,500.00 for each violation of each provision, plus any hearing costs incurred by the Board and the Agency. 415 ILCS 5/42(b)(4-5) (2010).

United States Constitution

Mr. Shafer asserts that the Agency’s inspection of his property violates the Fourth Amendment of the Constitution of the United States (U.S.), which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

AGENCY POSITION

Statutory Violations

The Agency alleges that respondent violated Sections 21(p)(1) and 21(p)(7) of the Act at the site by causing or allowing the open dumping of waste resulting in litter, and the deposition of construction or demolition debris. Comp. Brief at 1; 415 ILCS 5/21(p)(1, 7) (2010). In addition to his hearing testimony, the Agency relied on Mr. Burger’s April 7th inspection report, which described the materials present in a pile at the site. Comp. Brief; AC, Insp. Rep. The Agency alleges that the respondent violated Section 21(p)(1) of the Act due to the presence of “household waste, including plastic bags, other plastic, cardboard, cans, lumber, carpet, roofing material, soda bottles, and other common household items” on the site. Comp. Brief at 1-2. The Agency alleges that the respondent violated Section 21(p)(7) of the Act due to the presence of wood and roofing material in the pile. Comp. Brief at 4.

“Cause or Allow” the Violations

The Agency alleges that respondent caused or allowed the open dumping on the site because he had owned the property for two or three years, which was “plenty of time” to remedy any violations. Comp. Brief at 3-4. The Agency also points out that neither knowledge nor intent is required to cause a violation of the Act. Comp. Brief at 4 (citing County of Will v. Utilities Unlimited, Inc., et al., AC 97-41, slip op. at 5 (July 24, 1997) and People v. Fiorini, 143 Ill.2d 318 (1991)).

60 Day Service Requirement

In response to a concern raised by the respondent, the Agency maintains that the administrative citation complied with Section 31.1(b) of the Act, which establishes that any administrative citation must be served on the respondent “not more than 60 days after the date of the observed violation.” 415 ILCS 5/31.1(b); Comp. Brief at 3. The Agency reminds that the violations were observed on April 7, 2011, and respondent was served on June 3, 2011. Comp. Brief at 3. As June 3 is 57 days after the date of the observed violation on April 7, 2011, and 57 is not more than 60, the Agency maintains that the administrative citation complied with Section 31.1(b). Comp. Brief at 3.

Legality of Site Inspection

In response to a concern raised by the respondent, the Agency maintains that Dustin Burger’s inspection of the site was proper and within the scope of authority granted to the Agency pursuant to Section 4(d) of the Act. 415 ILCS 5/4(d); Comp. Brief at 3. As evidence of the reasonableness of the inspection, the Agency points to the facts that: 1) Mr. Burger had never met respondent prior to the hearing, 2) there was no indication that respondent intended to restrict access to the site, and 3) the inspection was conducted at a reasonable time. Comp. Brief at 3.

RESPONDENT POSITION

Service Requirement

Respondent alleges that the IEPA failed to meet the 60-day service requirement found in Section 31.1(b) of the Act. 415 ILCS 5/31.1(b); Resp. Brief at 1. Respondent points out that the IEPA inspected his property on September 29, 2010 and again on December 30, 2010, and that both dates were more than 60 days before he was served with the administrative citation on May 31, 2011. Resp. Brief at 1. Respondent claims that, “[Agency attorney] Michelle Ryan and the IEPA have decided to go with the April 7 inspection date because that would fit in to their 60 day requirement. However, it is clearly not the correct date of the ‘observed violation.’” Resp. Brief at 1.

Lack of a Warrant

Mr. Shafer alleges that the inspections performed on the site by Mr. Burger were improper because the 4th Amendment to the U.S. Constitution requires a warrant before such a search of his property. Resp. Brief at 1-3, citing U.S. Const. Amend. IV. Respondent also points out that Mr. Burger drove past “No Trespassing” signs when inspecting the site. Resp. Brief at 1-2. Respondent contends that:

even the FBI and the Illinois State Police must obtain a search warrant before they search persons or property but apparently the U.S. Constitution doesn’t include Dustin Burger, an employee from the IEPA. Resp. Brief at 2.

Denial of Alleged Violations

Mr. Shafer raises a number of issues in response to the Agency’s allegations. First, respondent claims that the on-site trash pile, or “burn pile” as he refers to it, had been there for 80 years. Resp. Brief at 2. Respondent pointed out that he had only owned the land for two to three years. In response to the Agency claim that two to three years was “plenty of time to clean it up” respondent stated “[w]hy would I want to do that? It was my burn pile.” *Id.*

Mr. Shafer also mentions that the pile was located on his property at a place where he would “rarely observe it” and that he was not aware of any dumping there until he received the Agency ACWN on January 19, 2011. Resp. Brief at 2-3. Respondent claimed that cleaning up the pile “could not be done” by the ACWN’s March 15, 2011 deadline. Resp. Brief at 3. At the hearing, respondent opined that cleaning up a pile outside during the winter would be difficult or impossible. Tr. at 14-15. In his brief, respondent claimed that he could not clean the pile because it was a “terribly wet spring.” Resp. Brief at 3.

Respondent’s Other Concerns

Respondent also raises various other concerns with the IEPA citation process. He notes that the IEPA first included a “Linda Shafer” or “Linda Shafer McGinnis” in the administrative citation, who he claims does not exist and who the IEPA later dismissed from the case. Resp. Brief at 2; *see Illinois Environmental Protection Agency v. Thad and Linda Shafer*, AC 11-28 (Sept. 22, 2011) (granting the Agency’s motion to voluntarily dismiss Linda Shafer).

Respondent also takes issue with the fact that he was directed to participate in four “phone hearings” before having a hearing in front of the hearing officer. Resp. Brief at 1. Respondent also alleged that Wilmer Mathews was lying when he told the Agency about his dumping activities on respondent’s property and that Mr. Mathews never had permission from respondent to dump anything on his property. Resp. Brief at 2.

Respondent also emphasized that certain aspects of the site did not directly respond to the allegations in the administrative citation. Respondent claimed that he was not “running a landfill without a permit,” that there was no air or water pollution coming from his pile, and that there were no hazardous materials present. Resp. Brief at 2-3. He also questioned conflicting

statements between the official inspection report and other reports and comments made by inspector Dustin Burger. Resp. Brief at 2.

Finally, respondent raises various general fairness concerns, such as claiming that all farmers have a place where they can burn things, and questioning why residents of nearby Jewett can burn trash, but he cannot. Resp. Brief at 2-3; Am. Pet. at 2.

BOARD DISCUSSION

The Agency alleges that respondent violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing the open dumping of waste, resulting in litter (415 ILCS 5/21(p)(1) (2010)), and the deposition of general or clean demolition and construction debris (415 ILCS 5/21(p)(7) (2010)). Comp. Brief at 1. Respondent raises both procedural and substantive defenses to the Agency's alleged violations. The procedural concerns raised by the respondent are that the Agency did not timely serve the administrative citation on respondent and that the inspections performed by Mr. Burger were unlawful. Resp. Brief at 1-2. If the Agency followed proper procedure under the Act for issuing an administrative citation, the only substantive issues the Board may consider are whether defendant: a) caused or allowed the violations as alleged, and b) whether the violations resulted from uncontrollable circumstances. 415 ILCS 31.1(d)(2); 35 Ill. Adm. Code 108.206; *see IEPA v. Bobby G. Myers and Donald D. Myers*, AC 07-30, slip op. at 11 (May 21, 2009).

First, the Board will discuss whether the Agency met the 60-day service requirement in Section 31.1(b) of the Act. Second, the Board will discuss whether the inspections performed by Mr. Burger were lawful. Third, the Board will discuss whether the conduct and the pile at issue meets the definitional requirements for the "open dumping" of "litter" and "construction or demolition debris" in violation of sections 21(p)(1) and 21(p)(7) of the Act. Then, the Board will discuss whether respondent "caused or allowed" the alleged violations. Last, the Board will discuss whether the alleged violations resulted from uncontrollable circumstances.

60-Day Service Requirement

As an initial matter, any administrative citation must be served on the respondent "not more than 60 days after the date of the observed violation." 415 ILCS 5/31.1(b). The Agency's administrative citation is based upon violations observed by inspector Dustin Burger on April 7, 2011. AC; Insp. Rep. at 1-2. The Agency served respondent with this administrative citation on June 3, 2011, 57 days after the observed violations. The Board finds that service was timely made within the 60 day time limit specified by 415 ILCS 5/31.1(b).

Mr. Shafer admits that he was served not more than 60 days after the April 7th inspection. But, he claims that the "correct" date of the observed violation is the first observed violation, which was on September 29, 2010. Resp. Brief at 1 ("Michelle Ryan and the IEPA have decided to go with the April 7 inspection date because that would fit in to their 60-day requirement").

However, the Board finds that this administrative citation only concerns the April 7, 2011 inspection. Mr. Burger's narration of prior events at the site provides background only, and do not serve as the basis of any allegations against Mr. Shafer. When the trailer debris was first revealed by Mr. Burger's first inspection on September 29, 2010, an administrative citation was issued to the respondent who had allegedly dumped the trailer, Wilmer Mathews. The inspection report tends to suggest that it was only after the December 30, 2010 inspection that the Agency had any evidence that Mr. Shafer had any involvement with the property at issue, due to the discarded mail found in the household trash on the site. Here, the Agency sent a warning ACWN to Mr. Shafer after the December 30, 2010 inspection, giving respondent an opportunity to address the violations without incurring penalties. Tr. at 16.

The Board finds that nothing in Section 31.1(b) requires the Agency to issue a citation after the first observed violation to any and all possible respondents. 415 ILCS 5/31.1(b). Here, the Agency was well within its prosecutorial discretion to first issue an administrative citation to Mr. Mathews, and then to send a warning to Mr. Shafer after the December-observed violation indicated he was a site owner, and to wait until a subsequent inspection to issue a citation to the respondent.

Lawful Inspection

Mr. Shafer raised concerns about the lawfulness of the Agency inspection of his property. Respondent claims that the Agency inspector, Mr. Burger, required a warrant to search his property but did not have one, that he drove past "no trespassing" signs, and that the searches violated the Fourth Amendment to the U.S. Constitution. Resp. Brief at 1-2; Tr. at 11-12. Respondent did not refer to the Act, but rather claimed that, "even the FBI and the Illinois State Police must obtain a search warrant before they search persons or property but apparently the U.S. Constitution doesn't include Dustin Burger, an employee from the IEPA." Resp. Brief at 2.

Section 4(d) of the Act establishes the requirements for Agency inspections:

In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:

- (1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/4(d) (2010).

While the Act determines what constitutes a "reasonable" inspection by the Agency, this is subject to "constitutional limitations."

The Fourth Amendment to the U.S. Constitution states that,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

The Fourth Amendment has two basic parts: first, it prohibits “unreasonable” searches and second, when a warrant is required for searches, it requires the warrant to be supported by probable cause. U.S. Const. Amend. IV.

Mr. Burger’s search of the respondent’s property on April 7, 2011 lasted from approximately 11:30 a.m. to 11:45 a.m. Insp. Rep. 1. The Board finds this is a “reasonable time” within which to perform such an inspection. 415 ILCS 5/4(d) (2010). Additionally, nothing about the search described in this record can be considered “unreasonable” such that it would violate either the Act or the Constitution. Mr. Burger attempted to contact the respondent as he knocked on the door upon arrival but received no answer. Insp. Rep. 1. Even if Mr. Shafer was unaware that Mr. Burger had inspected the premises twice previously, Mr. Shafer should reasonably have expected a visit to check for compliance following the March 15, 2011 ACWN cleanup deadline. Tr. at 16-17.

The Agency claims that there was no indication that respondent intended to restrict access. Comp. Brief at 3. However, respondent claims that Mr. Burger drove past “no trespassing” signs to get to his property. Resp. Brief at 1. Even assuming that Mr. Shafer’s property was posted with such signs, this is immaterial. Mr. Burger was not trespassing as the Act gives him the authority to inspect private property to ascertain violations of the Act during reasonable times. 415 ILCS 5/4(d) (2010).

Respondent claims that since Mr. Burger did not have a warrant, the inspection is a violation of the Fourth Amendment. Resp. Brief. at 1-2. Respondent further states that “even the FBI and the Illinois State Police must obtain a search warrant before they search persons or property.” Resp. Brief at 1-2.

The Board observes that the courts have interpreted the Fourth Amendment to place certain requirements on law enforcement personnel, such as the Illinois State Police or the FBI, which may require warrants in some situations for the search to be considered “reasonable.” See Donovan v. Dewey, 452 U.S. 594, 599-606 (1981). However, certain entities (such as the Illinois Environmental Protection Agency) often have statutorily created requirements that control what would be considered a “reasonable” search by personnel of such non-police governmental agencies. *Id.* Because the Act does not specifically require Agency inspectors to have a warrant before performing inspections, a warrant is not necessary for an Agency search to be “reasonable” under the Fourth Amendment. Therefore, the Fourth Amendment’s requirement that warrants be supported by probable cause is not applicable to reasonable Agency searches. U.S. Const. Amend. IV; 415 ILCS 5/4(d) (2010). See *e.g.* People v. Stauss, 151 Ill.App.3 191, 502 N.E.2d 1287 (1st Dist. 1986); Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994).

“Open Dumping” of “Litter” and “Construction or Demolition Debris”

The Agency alleges that respondent violated Sections 21(p)(1) and 21(p)(7) of the Act because respondent caused or allowed open dumping of waste resulting in litter (415 ILCS 5/21(p)(1) (2010) and the deposition of construction or demolition debris (415 ILCS 5/21(p)(7) (2010). Comp. Br. at 1. First, the Board will discuss whether respondent’s “burn pile” fell into the statutory definition of an “open dumping” of “waste” that resulted in “litter” or the deposition of “clean construction or demolition debris.” After discussing whether the burn pile meets these definitions, the Board will discuss whether the respondent caused or allowed this violation. Respondent never contested that his pile at issue met these definitions.

“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). “Refuse” means “waste,” (415 ILCS 5/3.385 (2010)) and “waste” includes “any garbage . . . or other discarded material.” 415 ILCS 5/3.535 (2010). In order to show a violation of Section 21(p)(1) of the Act, the Agency must show that the waste contains “litter.” 415 ILCS 5/21(p)(1) (2010). The Act itself does not define “litter” so the Board relies on the definition in the Litter Control Act:

Litter means any discarded, used, or unconsumed substance or waste. ‘Litter’ may include, but is not limited to, any garbage, trash, refuse, debris, rubbish. . . or anything else or an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly. 415 ILCS 105/3(a) (2010); *see St. Clair County v. Louis I. Mund*, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991).

In order to show a violation of Section 21(p)(7) of the Act, the Agency must show that the waste contained “construction or demolition debris” which includes “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”. 415 ILCS 5/3.160(a) (2010).

The April 7th inspection found a pile at the site that consisted of “household waste, including plastic bags, other plastic, cardboard, cans, lumber, carpet, roofing material, soda bottles, and other common household items.” AC, Insp. Rep. at 1-2 (including attached photographs). This includes items that meet the definitions of “refuse,” “waste,” “litter” and “construction or demolition debris” as defined in the Act. The evidence proves that some waste items were brought to the site from another location, so that these items had been consolidated at a disposal site that does not meet the requirements of a sanitary landfill. The result is that the actions and conditions at the Shafer site meet the definitional requirements for the “open dumping” of waste. 415 ILCS 5/3.305 (2010). Therefore, open dumping of waste resulting in “litter” and “construction” debris occurred at respondent’s site.

“Cause or Allow”

If respondent caused or allowed this dumping and has no other defenses, he would be in violation of Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1); 415 ILCS 5/21(p)(7). While the pile at the Shafer site met the definitional requirements for “open dumping” in violation of Sections 21(p)(1) and 21(p)(7), for respondent to be in violation of the Act he must have “cause[d] or allow[ed]” the dumping. 415 ILCS 5/21(p). While the Agency did not argue that respondent personally dumped the waste, it does allege that respondent “owned the property for two or three years . . . [and] that gave him plenty of time to address those violations.” Comp. Brief at 3-4. The question of ownership is not contested, as respondent admitted owning the site for “two or three years.” Tr. at 18.

The remaining question is the extent to which the respondent allowed these violations to occur during the time he owned the property. Mr. Shafer was well aware of the burn pile, which he claimed had been there for “80 years.” Resp. Brief at 2. In his brief, respondent admits that he voluntarily chose not to clean the site stating, “Why would I want to do that? It was my burn pile.” Resp. Brief at 2.

Respondent claimed he did not originally know that Wilmer Mathews had dumped the remains of a burned trailer on the burn pile, or that, even after Mr. Mathews claimed to clean up the site, some of those materials remained on the pile. Resp. Brief at 3. However, the record is clear that respondent was informed of the pile and the alleged violations on January 19, 2011 when he received the administrative citation warning notice from the Agency, which was about two and a half months prior to receiving the Agency citation. While respondent may or may not have personally placed and in that fashion “caus[ed]” the waste to be present in his burn pile, he owned the property for years, was aware of the pile, and chose not to clean it up.

The Board has clearly and long ago established that a current landowner “allows” the open dumping of waste if they take no action to remove an accumulation of waste on their property even when the current landowner was not the one who originally deposited the waste there. *See IEPA v. Bobby Myers*, AC 07-30, slip op. at 9 (May 21, 2009); *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.”). Here, Mr. Shafer “allowed” the violation to continue by taking no action to remedy the conditions of the site he purchased. Additionally, it was the responsibility of the respondent to take some steps to prevent others from dumping on his site and to ensure that his property was not in violation of the Act due to the actions of others. Here, Mr. Shafer “allowed” pollution by failing to secure and inspect his property to prevent illegal dumping of the sort accomplished by Mr. Mathews.

Uncontrollable Circumstances

If the Board finds that uncontrollable circumstances caused an alleged violation of the Act, the Board will issue a finding of no violation. 415 ILCS 5/31.1(d)(2) (2010). However,

while respondent raises a number of defenses in contesting the citation, the Act does not give the Board discretion to consider all possible defenses or mitigating circumstances. The Board's authority is narrowly confined; once it is established that the respondent owned the property at issue, that he caused or allowed the alleged violations, and that the Agency followed proper procedures, as has been established, then the only remaining defense the Board may consider is whether the violations were due to "uncontrollable circumstances." 35 Ill. Adm. Code 108.206.

As the Board explained previously,

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 . . . 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. IEPA v. Bobby G. Myers and Donald D. Myers, AC 07-30, slip op. at 11 (May 21, 2009) (citing 35 Ill. Adm. Code 108.206).

Mr. Shafer raised a number of defenses that essentially claimed the citation process was unfair in some way², but does not specifically address the issue of "uncontrollable circumstances." As none of the general unfairness claims relate to the issue of whether the violations were due to uncontrollable circumstances, nor do they relate to whether respondent caused or allowed the alleged violations, the Board cannot find that such defenses allow dismissal of this administrative citation.

Respondent does make some claims that can arguably be construed as a defense of uncontrollable circumstances. These generally revolve around claims that the site would be difficult or impossible to clean during winter or the spring. During the hearing, respondent questioned the Agency inspector, Mr. Burger, asking:

² For example, respondent alleged that: every farm in America has a burn pile and thus he should be allowed to have one as well (Tr. at 18; Am. Pet. at 2), that he is not allowed to burn trash but residents of Jewett can (Resp. Brief at 2-3), that the Agency citation originally included "Linda Shafer" who does not exist (Resp. Brief at 2), that Wilmer Mathews lied to the Agency and did not inform respondent that he dumped on the site (Resp. Brief at 2), that respondent's name was spelled wrong in a Board order (Resp. Brief at 2), that there were no hazardous materials, air pollution, or water pollution on the site (Resp. Brief at 2-3), that the hearing process was overly delayed (Resp. Brief at 1), that portions of the Administrative Citation warning notice (which were not submitted as evidence during the hearing and are not part of the record) were incorrect, that Mr. Burger's estimate of the size of the pile was incorrect (Resp. Brief at 2), that he later cleaned the pile and came into compliance (Resp. Brief at 3) and that the case was a "mole hill being made into a mountain" (Am. Pet. at 2) and was being "blown out of proportion" (Resp. Brief at 3).

Q (respondent): . . . In wintertime, is the ground frozen?

A (Mr. Burger): Sometimes.

Q: Is it real wet, muddy, couldn't clean it up if you tried?

A: Sometimes it is. Tr. at 15.

In his brief, respondent also claimed that

[a]s soon as the weather allowed I did have my burn pile cleaned up. Even though it could not be done by the IEPA Mar. 15, 2011 deadline . . . it was a terribly wet spring and I had it cleaned as soon as I could. Resp. Brief at 3.

The standard for proving “uncontrollable circumstances” is high. A mere statement that remedying the violation would be difficult or inconvenient is not sufficient to constitute “uncontrollable circumstances.” County of Jackson v. Alvin Valdez, AC 09-09, slip op. at 9 (Apr. 16, 2009). In order for a defense of uncontrollable circumstances to be valid, the respondent must show that it would be nearly impossible to come into compliance at the time the violation is observed. *Id.* The Board has consistently held that “adverse weather conditions are usually not uncontrollable circumstances.” *Id.*; see also City of Chicago, Dept. of Environment v. City Wide Disposal, Inc., PCB 03-11 (Sept. 4, 2003); City of Jackson v. Egnon Kamarasy, AC 04-63 (June 16, 2005).

Respondent’s claims do not meet this high burden. Respondent owned the property for two to three years, and he was aware of this burn pile, which he claims has existed for roughly 80 years. Tr. at 18; Resp. Brief at 2. During this time, respondent was aware of the pile and had ample opportunity to clean it up. Even assuming respondent may not have been aware of the construction materials until receiving the warning notice on January 19, 2011, that still gave respondent 78 days to address the alleged violations before the April 7, 2011 inspection.

Upon inspecting the premises in April, Mr. Burger observed that the site was “essentially the same” as his previous inspection. AC, Insp. Rep. at 2. The evidence in this record does not support a finding that respondent had attempted to clean the site during the 78 days after he received the ACWN. Respondent presented no evidence that the spring was so wet as to make the site nearly impossible to clean at any point within that 78-day window. Therefore, the Board finds that the adverse spring weather conditions do not result in uncontrollable circumstances that would prohibit Mr. Shafer from cleaning his property. And other than his admitted disinclination to do so, there is no reason presented why Mr. Shafer could not have removed the waste and litter from the site in the two to three years that he owned the property.

Additionally, respondent’s lack of knowledge that the waste existed on his property provides no defense since “violation of the Environmental Protection Act is *malum prohibitum*” and “no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt.” Meadowlark Farms, Inc. v. Illinois Pollution Control Board, 17 Ill.App.3d 851, 861, 308 N.E.2d 829, 836 (Ill.App. 1974). See Hindman v. Environmental Protection Agency, 42 Ill. App. 3d 766, 356 N.E.2d 669 (5th Dist. 1976). Lack of knowledge that Mr. Mathews was dumping on respondent’s property is irrelevant.

The Board therefore finds that the respondent failed to show that the violations resulted from “uncontrollable circumstances” or provide any other valid defense to this administrative citation.

CONCLUSION

After reviewing the record in this case and the relevant portions of the Act, the Board finds that Thad Shafer caused or allowed the opening dumping of waste resulting in litter and the deposition of general construction or demolition debris or clean construction or demolition debris. The Board finds that respondent owned the property, that the Agency timely served and filed the citation, that respondent caused or allowed the violations, and that the violations were not due to uncontrollable circumstances. Therefore, the Board finds that the respondent has violated Sections 21(p)(1) and 21(p)(7) of the Act. 415 ILCS 5/21(p)(1) and (p)(7) (2010).

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 assess hearing costs incurred by the Board and the Agency. 415 ILCS 5/42(b)(4-5) (2010); 35 Ill. Adm. Code 108.500(a). Because there are two violations of Section 21(p) and they are the respondent’s first adjudicated violations, in its final order, the Board will order the respondent to pay a civil penalty of \$3,000.00 plus costs. The schedule for the submission of cost statements and filing by Mr. Shafer of any objections is set out in the order below.

In closing, the Board wishes to address a couple of Mr. Shafer’s general fairness concerns. The Board is well aware that the “burn pile” or the “burn barrel” has been an everyday part of life in many communities during this State’s history. But, as convenient as this disposal means may be, it has been prohibited by the legislature in the Environmental Protection Act. Likewise, the materials on the Shafer site may not be as hazardous as some other waste materials. But, proper handling, storage and disposal of all waste materials is necessary to minimize degradation of soil, water, and air resources.

This constitutes the Board’s interim findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that respondent Thad Shafer violated Sections 21(p)(1) and 21(p)(7) of the Act.
2. The Illinois Environmental Protection Agency must file a statement of hearing costs within 14 days of this order, by August 9, 2012. The statement must be supported by affidavit and served upon the respondent. Within the same 14-day period, the Clerk of the Illinois Pollution Control Board must also file and serve upon the respondents a statement of the Board’s hearing costs supported by affidavit.
3. Respondent may file any objections to those statements within 30 days of service of those statements, by a date on or about September 10, 2011. 35 Ill. Adm. Code

108.506(a). The Agency may then file a reply to the respondents' 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 T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on July 26, 2012 by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board