

ILLINOIS POLLUTION CONTROL BOARD

August 8, 2002

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 02-2
)	(IEPA No. 292-01-AC)
NORDEAN and SUSAN SIMON d/b/a)	(Administrative Citation)
BERMAN'S AUTO PARTS,)	
)	
Respondents.)	

INTERIM OPINION AND ORDER OF THE BOARD (by C.A. Manning):

Today the Board decides whether Nordean and Susan Simon d/b/a Berman's Auto Parts (respondents) caused or allowed the open dumping of waste resulting in litter on their property in Belvidere, Boone County, in violation of the Environmental Protection Act (Act). Respondents own and operate a facility located at 8727 Townhall Road, Belvidere, Boone County, commonly known as Berman's Auto Parts. Respondents recycle automotive parts. The Illinois Environmental Protection Agency (Agency) issued an administrative citation based upon observations made by Agency Field Inspector Kaare Jacobsen (Jacobsen) on May 17, 2001. Jacobsen observed two large piles of used and waste tires and a solid waste pile on respondents' property.

The Board finds that respondents have caused or allowed the open dumping of waste resulting in litter on their property. The Board therefore concludes that respondents have violated the Act as alleged. The Board orders respondents to pay a civil penalty of \$1,500, plus any hearing costs incurred by the Board and the Agency.

PROCEDURAL MATTERS

On July 16, 2001, the Agency timely filed an administrative citation against respondents. *See* 415 ILCS 5/31.1(c) (2000); 35 Ill. Adm. Code 108.202(c). The Agency alleged that respondents violated Section 21(p)(1) of the Act. 415 ILCS 5/21(p)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. The Agency further alleged that respondents violated this provision by causing or allowing the open dumping of waste resulting in litter on their property in Belvidere, Boone County. On August 17, 2001, respondents filed a petition for review (415 ILCS 5/31.1(d) (2000); 35 Ill. Adm. Code 108.204). On April 23, 2002, the Board held a hearing in Belvidere. On May 20, 2002, complainant filed a post-hearing brief. On July 1, 2002, respondents filed a post-hearing brief.

APPLICABLE LAW

Section 21(p)(1) of the Act states:

No person shall:

* * *

(p) 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 dumpsite:

(1) litter. 415 ILCS 5/21(p)(1) (2000) *amended by P.A. 92-0574, eff. June 26, 2002.*

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 (2000).

Section 3.385 of the Act defines “refuse” as “waste.” 415 ILCS 5/3.385 (2000).

Section 3.535 of the Act defines “waste” as, among other things, “garbage . . . or other discarded material” 415 ILCS 5/3.535 (2000).

The Board utilizes the definition of “litter” as contained in the Litter Control Act (415 ILCS 105/3(a) (2000)). *See St. Clair County v. Fields*, AC 90-65 (Aug. 22, 1991). That definition of "litter" provides:

‘Litter’ means any discarded, used or unconsumed substance or waste. ‘Litter’ may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle . . . motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2000).

FACTS

Respondents have owned and operated Berman’s Auto Parts for 30 years. Respondents recycle automotive parts. Respondents stopped selling used tires approximately two years ago.

Agency Field Inspector Kaare Jacobsen visited the site on approximately 12 occasions, beginning in August 2000.

On January 8, 2001, the Agency sent a notice to respondents under the Used Tire Management Act (415 ILCS 5/55.3(d) (2000)). The notice referenced an accumulation of “in excess of 7,500 used or waste tires” at the site and directed respondents to provide a plan to the Agency for removal of the tires. In a letter dated February 5, 2001, respondents offered that “[b]eginning March 1, 2001 removal of 500 tires per month . . . [t]ires that are off the rims will be covered with plastic. If the cold and weather conditions prevent starting in March (2) two loads will be shipped in April.” Exh. 3.

In a letter dated February 27, 2001, Todd Marvel, a manager of the Agency’s used tire program, referenced a conversation with respondents on February 22, 2001. Marvel accepted respondents “cleanup plan with . . . clarifications.” The letter directed respondents to remove “at least 500 tires per month during the months of March and April 2001.” Further, the letter directed respondents to remove “at least 1000 tires per month beginning in May.” Exh. 4.

An invoice dated March 29, 2001 referenced removal of 356 tires from the site by Watertown Tire Recyclers, L.L.C. Exh. 7.

On May 17, 2001, Jacobsen visited the site. Jacobsen recorded his observations on an open dump inspection checklist, attaching a narrative inspection report and nine photographs. Eight of the photographs referenced two large piles of used and waste tires and a single photograph referenced a solid waste pile. Jacobsen described the tires as “with and without rims.” Jacobsen described the solid waste pile as “a pile with landscape waste mixed with piles of furniture, [and] building debris.” Comp. Exh. 1.

Respondent Susan Simon described two solid waste piles, the first as “shrubby, trees [and] a couple of drums” and the second as “roofing material.” Each of the solid waste piles had been present on the property approximately six months at the time of the photograph on May 17, 2001. Tr. at 80.

In a letter to respondents dated May 21, 2001, Marvel referenced Jacobsen’s inspection on May 17, 2001, and respondents’ failure to remove “any used or waste tires from the . . . site.” Exh. 6.

LEGAL ISSUES AND ANALYSIS

Respondents argue that “the [administrative] citation was wrongfully issued because the [Agency] accepted an [a]ction [p]lan which was being implemented in good faith by the respondents and the [Agency] is bound by its agreement and the [A]gency should be barred from seeking further civil remedies in the form of a civil penalty.”

The Board first decides whether respondents caused or allowed the open dumping of waste resulting in litter on their property, in violation of Section 21(p)(1) of the Act (415 ILCS 21(p)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). The Board then discusses the agreement referenced by respondents.

Jacobsen observed two large piles of used and waste tires. Jacobsen recorded his observations on an open dump inspection checklist, attaching a narrative inspection report and eight photographs. Jacobsen described the tires as “with and without rims.” Respondents do not dispute Jacobsen’s observations, the open dump inspection checklist, the narrative inspection report, or the photographs.

Respondents spend a great amount of time distinguishing between tires “with and without rims.” But, the Board has previously found that tires, with and without rims, are litter. *See IEPA v. Hess*, AC 94-73 (Mar. 16, 1995) (approximately 1500 tires scattered around property and most tractor tires on the rim); *IEPA v. Hammond*, AC 92-62 (Apr. 22, 1993) (500 used or worn tires at a junkyard); *IEPA v. Sickles*, AC 92-47 (Sept. 17, 1992) (used tires among litter); *IEPA v. Loveless*, AC 91-31 (Aug. 13, 1992) (used tires among litter found during inspection); *IEPA v. Sickles*, AC 92-47 (July 30, 1992) (used tires among litter); *IEPA v. Hillebrenner*, AC 92-16 (May 21, 1992) (litter included 500 tires in a ravine on rural property); and *IEPA v. Springman*, AC 90-79 (May 9, 1991) (a portion of the litter was an uncovered tire pile).

Although respondents suggest, “the [administrative] citation was actually issued only for tires which were off of rims,” we note that Jacobsen, in his narrative inspection report, specifically referenced “used/waste tires (with rims).” Further, the Board notes that the agreement referenced by respondents did not contemplate tires with rims. On March 17, 2001, the Used Tire Management Act defined “used tire” as “a worn, damaged, or defective tire which is not mounted on a vehicle wheel rim.” 415 ILCS 54.13 (2000).

The Board finds the two large piles of used and waste tires to be a consolidation of refuse from one or more sources at a site that does not fulfill the requirements of a sanitary landfill. Further, the Board finds the tires to be litter; discarded, used or unconsumed waste.

Respondents next argue that the solid waste pile “was merely spring cleaning” and “disposed of properly.” Resp. Post-Hrg. Br. at 6. Jacobsen described the solid waste pile as “a pile with landscape waste mixed with piles of furniture, [and] building debris.” Comp. Exh. 1. Respondent Susan Simon described two solid waste piles, the first as “shrubby, trees [and] a couple of drums” and the second as “roofing material.” Tr. at 80. Each of the solid waste piles had been present on the property approximately six months at the time of the photograph on May 17, 2001. Tr. at 80.

Although respondents offer that the solid waste pile “was gone when [Jacobsen] returned to the site after May 17, 2001,” the Board will not dismiss an administrative citation because an individual later engaged in remedial efforts. *IEPA v. Wright*, AC 89-227

(Aug. 30, 1990).

The Board finds the solid waste pile to be a consolidation of refuse from one or more sources at a site that does not fulfill the requirements of a sanitary landfill. Further, the Board finds the landscape waste mixed with building debris to be litter; discarded, used or unconsumed waste.

Respondents next argue that “the [administrative] citation was wrongfully issued because the [Agency] accepted an [a]ction [p]lan which was being implemented in good faith by the respondents and the [Agency] is bound by its agreement and the [A]gency should be barred from seeking further civil remedies in the form of a civil penalty.” Resp. Post-Hrg. Br. at 2.

This case is factually distinguishable from recent cases in which the Board has held that dual actions by the Agency excuse the recipient of an administrative citation from liability under Sections 21 and 31.1. This is not a case where inspectors from two bureaus of the Agency issued contradictory directives. IEPA v. Charles Goodwin, AC 02-17 (July 11, 2002) (citation dismissed). Neither is this a case where an Agency inspector advised the property owner that cleanup by a certain time would avoid issuance of an administrative citation. IEPA v. Marshall Pekarsky, AC 01-37 (Feb. 7, 2002), *appeal pending sub.nom.* IEPA v. Marshall Pekarsky, No. 2-02-0281 (2d Dist. Mar. 14, 2002).

In a letter dated February 27, 2001, Todd Marvel, a manager of the Agency’s used tire program, accepted respondents “cleanup plan with . . . clarifications.” The letter directed respondents to remove “at least 500 tires per month during the months of March and April 2001.” Further, the letter directed respondents to remove “at least 1000 tires per month beginning in May.” Although a tire recycler removed 356 tires from the site on March 29, 2001, respondents do not offer any further evidence of tire removal. Respondents did not comply with the directives of the Agency.

Further, the agreement respondents’ reference is to an agreement pursuant to the Used Tire Management Act (415 ILCS 5/53 et seq. (2000)). The Agency has not alleged a violation of the Used Tire Management Act. Rather, the Agency has alleged that respondents violated the land pollution and refuse disposal provisions of the Act (415 ILCS 5/21(p)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), leading to the issuance of the instant administrative citation.

In IEPA v. Hess, AC 94-73 (Mar. 16, 1995), the Board held that “[t]he Agency is not prohibited from alleging used tires on a site are waste resulting in litter in violation of Section 21(p)[(1)] simply because there exists another provision in the Act which addresses used tires (415 ILCS 5/53 (1992)).” Hess, AC 94-73, slip op at 10.

Hess owned and operated “a used car/truck/tire/tractor junkyard.” In 1990 a field inspector observed approximately three thousand tires on site. The Agency sent Hess an

administrative warning notice. Hess replied and listed the actions he intended to undertake to remove the tires. Between 1990 and 1992 Hess transported most of the tires to a facility in Decatur, Illinois. In 1994 the Agency found approximately 1500 tires remained at the site; the majority of the tires were tractor tires on the rim. The Agency issued an administrative citation.

Hess argued that the remaining tires were not in violation because the majority of the tires were on the rim. Hess cited provisions of the Used Tire Management Act. The Board noted “the administrative citation at issue does not allege violations of the [Used Tire Management Act]. It alleges violations of Section 21(p)[(1)] of the Act, open dumping resulting in litter.”

In the present case, the Agency chose to file an administrative citation alleging a violation of Section 21(p)(1) of the Act and further to allege that respondents violated this provision by causing or allowing the open dumping of waste resulting in litter on their property. Respondents’ argument that their agreement with the Agency pursuant to the Used Tire Management Act somehow excuses them from the alleged violation that resulted in an administrative citation is not meritorious.

The Board finds that respondents caused or allowed the open dumping of waste. The Board finds the two large piles of used and waste tires and the solid waste pile to be a consolidation of refuse from one or more sources at a site that does not fulfill the requirements of a sanitary landfill. Further, the Board finds the tires, landscape waste, and building debris to be litter; discarded, used or unconsumed waste.

PENALTY AND COSTS

Section 42(b)(4-5) of the Act provides:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of \$1,500 for a first offense and \$3,000 for a second or subsequent offense, plus any hearing costs incurred by the Board and the Agency. The penalties shall be deposited into the Environmental Protection Trust Fund, to be used in accordance with the provisions of the Environmental Protection Trust Fund Act. 415 ILCS 42(b)(4)(5) (2000).

In the Board’s final order in this case, respondents will be ordered to pay a civil penalty of \$1,500 based on the violation as found. Further, pursuant to Section 42(b)(4)(5) of the Act, respondents are also required to pay hearing costs incurred by the Board and the Agency. Those costs are not contained in the record at this time. Therefore as part of this interim order, the Clerk of the Board and Agency are ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon respondent.

CONCLUSION

The Board finds that respondents caused or allowed the open dumping of waste resulting in litter on their property. The Board therefore concludes that respondents have violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). The Board orders respondents to pay a civil penalty of \$1,500, plus any hearing costs incurred by the Board and the Agency.

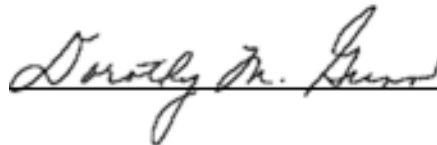
This interim opinion constitutes the Board's findings of fact and conclusions of law in this matter. A final order will be issued pursuant to the interim order which follows.

ORDER

1. The Board finds that Nordean and Susan Simon d/b/a Berman's Auto Parts have violated Section 21(p)(1) of the Environmental Protection Act (415 ILCS 5/21(p)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002).
2. The Illinois Environmental Protection Agency must file a statement of its hearing costs within 14 days of the date of this order, or by August 22, 2002. The statement must be supported by affidavit and served on respondents. Within the same 14 days (by August 22, 2002), the Clerk of the Board must file a statement of the Board's hearing costs supported by affidavit and with service.
3. Respondents are given leave to file a reply to the statements of hearing costs ordered in Paragraph 2 of this order within 14 days after receipt of that information.
4. The Board will then issue a final order assessing a statutory penalty of \$1,500 for the violation. In addition, the Board will award appropriate costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on August 8, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board