ILLINOIS POLLUTION CONTROL BOARD
March 20, 2014

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 09-41
	)	(IEPA No. 65-09-AC)
MARK A. LEWIS,	)	(Administrative Citation)
Respondent.	)	

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

The Illinois Environmental Protection Agency (Agency) timely filed an administrative citation against Mark A. Lewis (respondent) alleging that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) by causing or allowing open dumping in a manner resulting in litter. The administrative citation concerns respondent's residential property, located at 1835 Bunnyville Drive in Clay City, Clay County. For the reasons discussed below, the Board finds that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) and that a fine of $3,000 is proper. 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 also be assessed against respondent.

PROCEDURAL HISTORY

On May 6, 2009, the Agency timely filed with the Board an administrative citation (AC) against respondent. AC at 1. The Agency served respondent with the AC on April 30, 2009. *Id.* Based on an April 1, 2009 Agency inspection of respondent's property, the Agency alleges that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) by causing or allowing the opening dumping of waste in a manner resulting in litter. *Id.* at 1-2. The Agency further alleges that this violation is respondent's second or subsequent violation of Section 21(p)(1) and therefore asks the Board to impose a $3,000 penalty. *Id.* at 2; s*ee* IEPA v. Mark A. Lewis, AC 07-31, slip op. at 2 (March 15, 2007).

On June 8, 2009, respondent timely filed a petition (Pet.) with the Board to contest the AC. Pet. at 1. In the petition, respondent stated that he is using or has plans to use most of the vehicles that were photographed during the Agency's April 1, 2009 inspection of his property. *Id.* at 1-2. The Board, on June 18, 2009, accepted respondent's petition as timely, but directed the respondent to file an amended petition due to deficiencies in respondents' petition. Specifically, the Board found that respondent failed to allege any recognized grounds for contesting the AC in his petition. *See* 35 Ill. Adm. Code 108.206. The Board further found that there was no indication that respondent had served a copy of the petition upon the Agency. IEPA v. Mark A. Lewis, AC 09-41, slip op. at 2 (June 18, 2009); *see* 35 Ill. Adm. Code 101.304.

Respondent filed an amended petition (Am. Pet.) on July 8, 2009, which stated that he did not understand that there was an ongoing violation on his property, but that he was "willing to work with the [Agency] to get all matters resolved." Am. Pet. at 1. On July 23, 2009, the Board accepted respondent's amended petition as timely, but directed the respondent to file a second amended petition stating the grounds for appeal. IEPA v. Mark A. Lewis, AC 09-41, slip op. at 2 (July 23, 2009). Respondent filed a second amended petition (Second Am. Pet.) on August 26, 2009, which stated that the violation "resulted from uncontrollable circumstances." Second Am. Pet. at 1. The Board accepted the second amended petition for hearing on September 3, 2009. IEPA v. Mark A. Lewis, AC 09-41, slip op. (Sept. 3, 2009).

A hearing (Tr.) took place on October 23, 2013, at the City Hall in Flora, Clay County. Tr. at 1. Special Assistant Attorney General Michelle Ryan appeared on behalf of the complainant and respondent appeared *pro se*. *Id.* at 2, 4. Two witnesses testified during the hearing: Mr. Garrison Gross, an inspector at the Agency's Marion Regional Office, and respondent. *Id.* at 5, 14. Jill Lomas, respondent's fiancé, made a public comment at the hearing. *Id.* at 23. The complainant offered the Open Dump Inspection Checklist, dated April 1, 2009, as an exhibit (Exh. 1), which was admitted into the record. *Id.* at 12. The Agency timely filed a post-hearing brief that the Board received on November 13, 2013. Respondent has not filed a brief.

FACTS

Respondent owns residential property in Clay County known to the Agency as "Clay City/Lewis, Mark A." and designated with site code number 0258025002 (the Site). AC at 1. The Agency characterizes the Site as an open dump operating without a permit. *Id.* On April 1, 2009, Garrison Gross, of the Agency's Marion Regional Office, inspected the Site. Tr. at 7; Exh. 1 at 1.

The April 2009 inspection was performed as a follow-up to a December 7, 2006 inspection of the Site. Exh. 1 at 3. The December 7, 2006 inspection resulted in an administrative citation against respondent, filed with the Board on January 9, 2007. *See* IEPA v. Mark A. Lewis, AC 07-31, slip op. at 2 (March 15, 2007). On March 15, 2007, the Board found respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) and directed respondent to pay a penalty of $1,500. *Id.*

During the April 2009 inspection, Mr. Gross estimated that there were 210 cubic yards of waste on the Site and took 13 photos. Exh. 1 at 1. In the narrative inspection report Mr. Gross says that "wastes including but not limited to vehicles, white goods, domicile waste and household waste" could be seen from Bunnyville Drive before he entered the Site. *Id*. at 3. Of the 25 vehicles observed at the Site, Mr. Gross stated that ten of them had been observed at the Site during the December 2006 inspection. *Id*. Mr. Gross indicated that none of the vehicles appeared to have been driven recently. *Id.*

At hearing, Mr. Gross gave testimony consistent to his inspection report detailing the kinds of waste observed and the conditions of the vehicles. Tr. at 5-13. Mr. Gross testified that none of the vehicles at the Site appeared to have current license plates, and that many had

missing or broken windows. *Id.* Mr. Gross further testified that some of the vehicles had body damage or were missing mechanical components, and that none of the vehicles appeared to have been driven for some time. *Id.* The photographs that Mr. Gross took of the waste show the materials, including white goods and household items, scattered throughout the Site. Tr. at 8-11; *see also* Exh. 1.

STATUTORY BACKGROUND

Section 21(p) of the Act prohibits any person from causing or allowing open dumping of any waste in a manner which results in litter at the dump site. 415 ILCS 5/21(p)(1) (2012).

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 (2012). Section 3.385 of the Act defines "refuse" as "waste." 415 ILCS 5/3.385 (2012). Section 3.53 of the Act, in pertinent part, defines "waste" as, "garbage . . . or other discarded material." 415 ILCS 5/3.53 (2012).

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); *see* 415 ILCS 105 (2012). Section 3 of the Illinois Litter Control Act provides:

> 'Litter' means any discarded, used or unconsumed substances 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) (2012).

Section 31.1(d)(2) of the Act provides that "[i]f 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) (2012). 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) (2012).

DISCUSSION

The Agency alleges that the respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) by causing or allowing the open dumping of waste resulting in litter. AC at 1-2. The respondent's purported defenses to the alleged violation are that he was unaware of the ongoing violations, and that the violation occurred as a result of uncontrollable circumstances. Am. Pet. at 1; Second Am. Pet. at 1. Additionally, during status conference calls with the Hearing Officer, the respondent noted, on several occasions, that he was attempting to remedy the violation. *See, e.g.* Hearing Officer Orders (April 13, 2011 and Nov. 28, 2012). However, voluntary clean up action following a properly alleged violation is not a valid defense. In IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990), the Board stated that "[t]he Act, by its terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans-up the site."

As a threshold matter, to prove a violation of Section 21(p)(1), the Agency must first prove a violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2012)). Section 21(a) provides that "[n]o person shall: (a) Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2012). The respondent argues that he did not discard the materials at the Site because he planned to use the vehicles for parts, and that therefore, the materials were not waste. Pet. 1-2. However, the Board finds that respondent's intended future use of the materials are not dispositive of whether the materials were waste or litter. *See* County of Sangamon v. Daily, AC 01-16, 01-17 (cons.), slip op. at 10, 12-13 (Jan. 10, 2012) (despite expressed "intention to use every single discarded item . . . numerous items were not in use, were not useable in their current condition, and were not stored in such a way as to protect any future use"), *aff'd sub. nom.* Everett Daily v. County of Sangamon, No. 4-02-0139 (4th Dist. Sept. 18, 2003) (unpublished).

The Board finds that the deteriorated vehicles and variety of other materials at the Site were discarded, and therefore are considered waste. Mr. Gross's testimony and photographs establish that the Site contained substantial amounts of discarded materials. Specifically, the photographs show approximately 25 vehicles scattered throughout the Site, some with missing or broken windows. Exh. 1 at 3. Further, Mr. Gross observed that some of the vehicles had body damage or were missing mechanical components, that the interiors of several vehicles had become weathered due to broken windows, and that the vehicles had not been in use for some time. *Id.* The Board finds that under these circumstances, the materials were "discarded" and therefore constitute "waste" under the Act. Also, it is undisputed that the Site does not meet the requirements for a sanitary landfill. Therefore, the Board finds that in bringing the materials to his property and depositing them there, respondent "open dumped" the waste.

Furthermore, as noted above, the Board has adopted the definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See* St. Clair County, AC 90-64, slip op. at 4, 6. Consistent with the discussion above, the Board finds that the vehicles and other discarded material on respondent's property falls within the definition of "litter." Thus, the Board finds that respondent's open dumping of waste resulted in litter.

The Board finds that respondent's argument that he was not aware of the ongoing violation occurring on his property is not a defense to alleged open dumping violations. Because knowledge is not an element of a violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)), lack of knowledge is not a defense. *See* Caseyville Sport Choice, LLC v. Erma I. Sieber, et al., PCB 08-30, slip op. at 8 (Feb. 3, 2011). In order for a violation to be found, "it is not necessary to prove guilty knowledge or *mens rea*." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793 (5th Dist. 1993). To prove a violation, the Agency only needs to show that "the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." *Id.*, citing Phillips Petroleum Co. v. IEPA, 72 Ill. App. 3d 217, 220-21 (2d Dist. 1979). Here, respondent does not dispute that he is the owner of the property and that he operates the Site. *See* Tr. 14-15. Respondent also does not dispute that he is responsible for bringing the vehicles and other materials to the Site. *Id.* To the contrary, respondent indicated at hearing that he manages the property and manipulates the vehicles on the property, illustrating that he has ownership and control of the Site. *See e.g.*, Tr.

at 16, 18, 20. Accordingly, the Board finds that respondent exercised control of the Site and caused or allowed the open dumping of waste, documented by the Agency on April 1, 2009.

Lastly, if the Board finds that uncontrollable circumstances caused an alleged violation of the Act, the Board issues a finding of no violation. 415 ILCS 5/31.1(d)(2) (2012). A party can claim uncontrollable circumstances as a defense only when unpredictable conditions make it nearly impossible to come into compliance at the time a violation is observed. City of Chicago, Dept. of Environment v. City Wide Disposal, Inc., PCB 03-11, slip op. at 9-10 (Sept. 4, 2003). Here, respondent merely asserts the defense of uncontrollable circumstances, without providing any facts supporting such argument. *See* Second Am. Pet. at 1. Respondent further asserts that he was not aware of an ongoing violation on his property. *Id.* As discussed above, respondent's awareness of the violation is not a defense to the violation. Further, being unaware of the violation is not evidence of uncontrollable circumstances. Therefore, the Board finds that no uncontrollable circumstances existed.

The Board finds that respondent caused or allowed the open dumping of waste resulting in litter. Further, the Board finds that respondent did not establish a valid defense. Therefore, the Board finds that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)).

Civil Penalty and Hearing Costs

The Agency seeks the statutory $3,000 civil penalty for each alleged violation that was a second or subsequent violation. AC at 2. Because the respondent violated Section 21(p)(1) of the Act, the Board now addresses the issue of civil penalties and hearing costs. Both are addressed in Section 42(b)(4-5) of the Act:

> 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 each violation of each such provision, plus any hearing costs incurred by the Board and the County, except that the civil penalty shall be $3,000 for each violation of any provision of subsection (p) of Section 21 that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2012).

In this case, the Board finds respondent violated Section 21(p)(1) of the Act. As discussed above, the Board made a similar finding against the respondent in IEPA v. Mark A. Lewis, AC 07-31 (March 15, 2007). Therefore, this is respondent's second or subsequent adjudicated violation of Section 21(p)(1) (415 ILCS 5/21(p)(1) (2012). Therefore, the civil penalty is statutorily set at $3,000. *See* 415 ILCS 5/42(b)(4-5) (2012); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the $3,000 penalty in its final opinion and order.

In addition, by unsuccessfully contesting the AC at hearing, the respondent must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2012); 35 Ill. Adm. Code 108.500(b)(3). The Agency and the Clerk of the Board are each directed to file a statement

of costs, supported by affidavit, and to serve the filing on respondent. The respondent will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that respondent violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)) by causing or allowing the open dumping of waste resulting in litter. Respondent must pay a civil penalty of $3,000 and the hearing costs of the Agency and the Board. As set forth in the order below, the Board directs the Agency and the Clerk of the Board to file hearing costs documentation, to which respondent may respond. After the time periods for the filings on hearing costs have expired, the Board will issue a final opinion and order imposing the civil penalty on respondent and assessing against him any appropriate hearing costs.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that Respondent Mark A. Lewis violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2012)).

2. By April 3, 2014, the Agency and Clerk of the Board must each file a statement of hearing costs, supported by affidavit, with service on respondent.

3. By April 17, 2014, respondent Mark A. Lewis may file a response with the Board to the filings required by this order, with service on the Agency.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2014, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board