

5, 2012, the Board accepted the settlement. People v. Zachary Isaac d/b/a Nu Shine Car Wash, and Samuel Johnson, PCB 11-58 (Apr. 5, 2012). Under the proposed stipulation and settlement Samuel Johnson neither admitted nor denied the alleged violations and agreed to pay a civil penalty of \$4,000.00. *Id.* Zachary Isaac d/b/a Nu Shine Car Wash was not a party to the stipulation. *Id.*

On July 12, 2012, the People filed a motion to deem facts admitted and for summary judgment (Mot.) against Zachary Isaac. The motion was served on Zachary Isaac on August 22, 2012. There has been no response from Zachary Isaac.

COMPLAINT

The People allege that Zachary Isaac violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010) by causing or tending to cause water pollution (Count I). Specifically, the People allege that sludge, oil, dirt and detergents contained in waste water from the car wash are nondomestic sources are “contaminants” pursuant to Section 3.165 of the Act (415 ILCS 5/3.165 (2010)) Comp. at 4. Furthermore, the People allege that the Algonquin sewer system is a “water” of the State as that term is defined in Section 3.550 of the Act (415 ILCS 5/3.550 (2010)). The People maintain that Zachary Isaac made unpermitted discharges of untested nondomestic contaminants into the Algonquin sewer system and that the discharge of contaminants is likely to create a nuisance or render water harmful to human or animal life or health. *Id.* The People assert that by constructing their own sewer line and discharging untested nondomestic waste water into the Algonquin sewer system, Zachary Isaac caused, threatened or allowed the discharge of contaminants into the environment so as to cause or tend to cause water pollution. *Id.*

The People allege that Zachary Isaac violated Section 12(b) of the Act, 415 ILCS 5/12(b) (2010), and Section 309.202(a) of the Board’s Water Pollution Regulations (35 Ill. Adm. Code 309.202(a)) by constructing a sewer line capable of causing or contributing to water pollution without a permit (Count II). Comp. at 5-6. The People maintain that Zachary Isaac created a connection to carry wastewater from the car wash into the Algonquin sanitary sewer system and that connection is a “sewer” as that term is defined in Section 301.390(a) of the Board’s Water Pollution Regulations. Comp. at 6. The People further allege that the sewer line is capable of causing or allowing water pollution. *Id.*

The People next allege that Zachary Isaac violated Section 12(h) of the Act, 415 ILCS 5/12(h) (2010) by introducing non-domestic contaminants in Algonquin sewer system. Comp. at 7-8. The People maintain that Zachary Isaac introduced contaminants from nondomestic sources into a sewer line that was constructed without complying with the Act and Board Regulations and so as to cause water pollution in violation of the Act. *Id.*

FACTS

Zachary Isaac operated a business called Nu Shine Car Wash at 1065 W. Algonquin Road, Algonquin, McHenry County. On July 29, 2009, two Agency inspectors inspected the car wash. Comp. at 2. During that inspection the inspectors observed that a trench had been excavated and refilled from the car wash to the Algonquin’s sanitary sewage collection system.

Id. The inspectors also observed a “triple basin system” that appeared to flow from the car wash’s floor drains into the septic system as well as the Algonquin sewer system. *Id.* The triple basin was filled with sludge and oil deposits.

On July 31, 2009, one of the inspectors returned to the car wash to perform and observe a dye test. The dye was placed into the car wash triple basin system and was detected a few minutes later in the Algonquin sanitary sewer manhole. Comp. at 2. The dye test confirmed a connection between the car wash’s floor drains and triple basin system to the Algonquin sewer system. The inspector also observed that containers of oil and other contaminants were being stored in the vicinity of the triple basin system. *Id.*

Wastewater from the car wash contains both domestic and nondomestic sources. Nondomestic sources include the car washing operation and discharges from the triple basin system. Comp. at 2. Zachary Isaac does not have, and has never had, a permit from the Agency for the construction of a sewer line, for connection to the Algonquin sewer system or for the discharge of sewage from a nondomestic source. *Id.*

STATUTORY AND REGULATORY BACKGROUND

Section 12 of the Act provides in pertinent part:

No person shall:

- a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.
 - b) Construct, install, or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.
- * * *
- h) Introduce contaminants into a sewage works from any nondomestic source except in compliance with the regulations and standards adopted by the Board under this Act. 415 ILCS 5/12(a), (b) and (h) (2010).

Section 3.165 of the Act defines “Contaminant” as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2010). Section 3.550 of the Act defines “Waters” as “all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550 (2010).

Section 309.202(a) of the Board's rules provides:

Except for treatment works or wastewater sources which have or will have discharges for which NPDES Permits are required, and for which NPDES Permits have been issued by the Agency:

- a) No person shall cause or allow the construction of any new treatment works, sewer or wastewater source or cause or allow the modification of any existing treatment works, sewer or wastewater source without a construction permit issued by the Agency, except as provided in paragraph (b). 35 Ill. Adm. Code 309.202(a).

Section 103.204(d) provides:

- d) Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

PEOPLE'S REQUEST TO DEEM FACTS ADMITTED

The People filed their complaint against Zachary Isaac on March 4, 2011 and on June 21, 2011; Zachary Isaac was served by personal service. Mot. at 2. The People note that Zachary Isaac has not filed an appearance, answer or other pleading. *Id.* The People further note that the Board's rules provide that if no answer is filed, the facts pled in the complaint are deemed admitted. *Id.*, citing 35 Ill. Adm. Code 103.204(d). Therefore, the People ask that the Board deem the facts pled in the complaint as admitted by Zachary Isaac.

MOTION FOR SUMMARY JUDGMENT

Under Count I, the People argue that the inspector observed a trench from the car wash to the sewer line and the triple basin system filled with sludge and oil. Mot. at 4. Further, the inspector observed wastewater from the car wash entering the triple basin system. *Id.* The People maintain that the inspector confirmed that wastewater from the triple basin system entered the Algonquin sewer system. *Id.*

The People argue that the car wash does not have and never has had a permit from either the Agency or Algonquin to construct a sewer line. Mot. at 4-5. The People assert that the Algonquin sewer is a water of the state and the discharge from the triple basin system to the sewer results in contaminants entering a water of the State. Mot. at 5. Thus, the People assert,

Zachary Isaac has caused or tended to cause water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2010)). Mot. at 6.

The People maintain that the same set of facts support a finding of a violation of Section 12(b) of the Act (415 ILCS 5/12(b) (2010)) and Section 301.390(a) of the Board rules (35 Ill. Adm. Code 301.390(a)). The People argue that the facts establish that Zachary Isaac constructed a sewer line without a permit and therefore a finding of violation is appropriate. Mot. at 6.

The People also maintain that the facts establish that Zachary Isaac violated Section 12(h) of the Act (415 ILCS 5/12(h) (2010)). Mot. at 7. The People argue that Zachary Isaac constructed a sewer line and introduced contaminants into the sewer system without a permit. *Id.* The People assert that these facts support a finding of violation against Zachary Isaac. *Id.*

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E. 2d at 370, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. -3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

DISCUSSION

The Board will first address the request to deem facts admitted and then move to the motion for summary judgment.

Request to Deem Facts Admitted

The complaint was served on Zachary Isaac on June 21, 2011. As of today, no answer has been filed. The Board’s rules clearly state that “all material allegations of the complaint will be taken as admitted if no answer is filed.” 35 Ill. Adm. Code 103.204(d). The time for filing an answer has long passed. *See Id.* Therefore, the Board finds that Zachary Isaac has waived any objection to the material allegations contained in the complaint, and the facts are deemed admitted. Because the Board has found that all facts alleged in the complaint are deemed admitted, there are no issues of material fact, and summary judgment is appropriate.

Motion for Summary Judgment

Zachary Isaac did not respond to the People’s motion for summary judgment. The Board’s procedural rules provide that, “within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d); People v. Env’tl Health and Safety Svcs., Inc., PCB 05-51, slip op. at 13 (Jul. 23, 2009). The Board finds that by failing to respond to the People’s motion for summary judgment, the Zachary Isaac has waived any objection to the Board granting the motion for summary judgment. *See Id.*

The People’s three-count complaint alleges violations of Section 12(a), (b) and (h) of the Act (415 ILCS 5/12(a), (b), and (h) (2010)) and Section 301.390(a) (35 Ill. Adm. Code 301.390(a)). To find a violation of these provisions, the Board must find that the People have alleged facts sufficient to demonstrate that Zachary Isaac caused contaminants to enter the water of the State causing water pollution and that a sewer line was constructed without a permit. The dye test performed and observed by the Agency’s inspector demonstrates that wastewater was exiting the car wash, through a sewer line, and entering the Algonquin sewer system. Neither the car wash nor Zachary Isaac had a permit from the Agency or Algonquin to construct the sewer line from the car wash to the Algonquin sewer system. Therefore, the Board finds that Zachary Isaac, by constructing the sewer line without a permit and by allowing contaminants from the car wash to flow into the Algonquin sewer system, has violated Section 12(a), (b) and (h) of the Act (415 ILCS 5/12(a), (b), and (h) (2010) and of Section 301.390(a) (35 Ill. Adm. Code 301.390(a)) as alleged in the complaint. The Board grants the People’s motion for summary judgment.

REMEDY

Statutory Provisions Relating To Penalties

Section 33(c) of the Act provides as follows:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2010).

Section 42(h) of the Act provides as follows:

In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (5) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
- (7) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.
- (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if

any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2010).

People's Request for Penalty

The People request a \$10,000 civil penalty and argue that the factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)) support such a penalty.

Section 33 (c) Factors

The People argue that the Section 33(c)(i) and (c)(iv) strongly support an assessment of a civil penalty. Mot. at 8. The People claim that Zachary Isaac's pollution of the Algonquin sewer system was a significant interference with the health, welfare and physical property of the State. *Id.* The People argue that permits are required for connections to a municipality's sewer system to allow the Agency and municipalities to regulate and monitor the connections. *Id.* Failure to obtain a permit allowed Zachary Isaac to avoid oversight of the wastewater disposal from the car wash. *Id.* Furthermore, the People argue that Zachary Isaac knowingly constructed the sewer connection and never attempted to obtain a permit. Mot. at 8-9. Finally, the People note that there is no indication that the car wash had a situation that made compliance with the Act and Board regulations technically impracticable or economically unreasonable. Mot. at 9.

Section 42(h) Factors

The People argue that Zachary Isaac's violations interfered with the health, general welfare, and property of the people and continued from at least June 29, 2009 until September 1, 2009. Mot. at 9. The People claim that Zachary Isaac's failure to get a permit for the sewer line resulted in the Agency being unable to review the project to ensure the project would not harm the environment or human health. *Id.*

The People argue that Zachary Isaac was not diligent in attempting to comply with the Act and Board regulations. Mot. at 10. The People also claim that Zachary Isaac realized an economic benefit of at least \$1300 by failing to apply for and receive a permit. *Id.* The People believe a \$10,000 penalty will serve to deter other persons similarly situated and the People are unaware of any previously adjudicated violations against Zachary Isaac. *Id.* The People note that Zachary Isaac did not self disclose the violations and has not completed a compliance commitment agreement. Mot. at 11.

REMEDY DISCUSSION

The Board will discuss each of the Section 33(c) and 42(h) factors below. The Board will then explain the reasoning for the civil penalty being assessed.

Section 33(c) Factors

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People

The record clearly demonstrates that contaminants were entering the Algonquin sewer system through a sewer line that was constructed without a permit. Thus, neither Algonquin nor the Agency had knowledge of the connection, and as a result were unable to monitor the construction or contaminants entering the system. Therefore, The Board finds that this factor weighs against Zachary Isaac.

The Social and Economic Value of the Pollution Source

The record contains no evidence of the social and economic value of the car wash. Therefore, the Board finds that this factor weighs neither in favor of nor against Zachary Isaac.

The Suitability or Unsuitability of the Pollution Source to the Area in Which it is Located, Including the Question of Priority of Location in the Area Involved

The record contains no evidence of the suitability or unsuitability of the car wash to its location. Therefore, the Board finds that this factor weighs neither in favor of nor against Zachary Isaac.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

The People argue that compliance with the Act is technically practical and economically reasonable. The Board agrees that applying for a permit and properly constructing a sewer line is technically practicable and economically reasonable. Therefore, this factor must be weighed against Zachary Isaac.

Any Subsequent Compliance

The record indicates that the violations continued until September 1, 2009. The Board finds that this factor weighs against Zachary Isaac.

Finding on Section 33(c) Factors

The Board agrees with the People that factors in Sections 33(c)(i) and 33(c)(iv) justify requiring Zachary Isaac to pay a civil penalty. The potential character and degree of injury balanced against the technical practicality and economic reasonableness of compliance establishes that a penalty is appropriate. Therefore the Board finds that the Section 33(c) factors support a civil penalty being imposed against Zachary Isaac.

Section 42(h) Factors

Duration and Gravity of the Violation

The violation began before July 29, 2009 and continued until at least September 1, 2009. Thus, the duration for the violation was over 34 days. As discussed above, the violation are also grave in that a sewer line was constructed and used to deposit wastewater into Algonquin's sewer system without oversight by either Algonquin or the Agency. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Due Diligence

The record contains no evidence that the Zachary Isaac made any attempt to properly comply with the requirements of the Act. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Economic Benefits Accrued

The People indicate that Zachary Isaac saved approximately \$800 in permit fees and another \$500 for preparation of the application. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Penalty Which Will Serve To Deter Further Violations

The People argue that a total civil penalty of \$10,000 will help to deter future violations. The Board agrees that a civil penalty of \$10,000 will act as a deterrence. The Board finds that consideration of this factor neither mitigates nor aggravates against a substantial penalty.

The Number, Proximity in Time, And Gravity of Previously Adjudicated Violations of This Act by the Violator

The record contains no evidence of prior adjudicated violations and the People indicate that they are unaware of any previous violations. The Board finds that that consideration of this factor mitigates against a substantial penalty.

Self Disclosure

Zachary Isaac did not self disclose the violations. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Supplemental Environmental Project

A supplemental environmental project is not at issue in this proceeding, so this factor neither aggravates nor mitigates the assessment of a penalty.

Compliance Commitment Agreement

A compliance commitment agreement is not at issue in this proceeding, so this factor neither aggravates nor mitigates the assessment of a penalty.

Appropriate Civil Penalty

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). People v. Gilmer, PCB 99-27 (Aug. 24, 2000). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Gilmer, PCB 99-27, slip. op. at 8.

The Board has stated that the statutory maximum penalty “is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.” Gilmer, PCB 99-27, slip. op. at 8, citing IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990), slip. op. at 72. The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. *See* 415 ILCS 5/42(a) and (b) (2008). Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues.

In this case, the civil penalty that could be assessed is \$490,000. However, in consideration of the evidence and in view of the economic benefit of nearly \$1,300, the Board is convinced that \$10,000 civil penalty requested by the People is sufficient. The imposition of \$10,000 penalty will serve to deter future violations, while also recovering the economic benefit accrued by Zachary Isaac.

CONCLUSION

The Board finds Zachary Isaac violated Sections 12(a), (b), and (h) of the Act (415 ILCS 5/12(a), (b), and (h) (2010)), and Section 309.202(a) of the Board’s Water Pollution Regulations (35 Ill. Adm. Code 309.202(a)). Zachary Isaac violated these provisions while operating a car wash. After consideration of the factors in Section 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)), the Board finds that a civil penalty of \$10,000 is appropriate.

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

ORDER

1. Zachary Isaac d/b/a Nu Shine Car Wash (Zachary Isaac) must pay a civil penalty of \$10,000 no later than October 22, 2012, which is the first business day following the 30th day after the date of this order. Zachary Isaac must pay the

civil penalty by certified check, money order, or electronic funds transfer, payable to the Illinois Environmental Protection Agency for deposit into the Environmental Protection Trust Fund. The case name, case number, and Zachary Isaac's social security number or Federal employer identification number must appear on the face of the certified check or money order.

3. Zachary Isaac must submit payment of the civil penalty to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2010)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2010)).
5. Zachary Isaac must cease and desist from future violations of the Environmental Protection Act and Board regulations that were the subject of the complaint.

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 September 20, 2012, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board