

ILLINOIS POLLUTION CONTROL BOARD

July 25, 2019

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 10-86
	)	(Enforcement-Water)
ILLINOIS FUEL COMPANY, LLC,	)	
a Kentucky limited liability company, and	)	
CHEYENNE RESOURCES, INC., a Kentucky	)	
corporation	)	
	)	
Respondents.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by C.M. Santos):

On May 16, 2013, the Board accepted a five-count amended complaint against Illinois Fuel Company, LLC (Illinois Fuel) filed by the Office of the Attorney General on behalf of the People of the State of Illinois (People). On January 21, 2015, the People filed a motion for summary judgment on Counts I, II, III, and V of the amended complaint. On January 11, 2018, the Board granted the People's motion to join Cheyenne Resources, Inc. (Cheyenne) as a respondent.

The amended complaint concerns two coal mines. The first, known as the I-1 mine, is located in Saline County and is the subject of Counts I and II. On February 22, 2018, the Board accepted a settlement of counts I and II between the People and Cheyenne, which is intended to be the final adjudication of this matter against Cheyenne.

The second mine, known as the #4 mine, is located in Gallatin County and is the subject of Counts III, IV, and V of the amended complaint. The People intend to resolve the remaining counts of the amended complaint through the pending motion for summary judgement against Illinois Fuel.

For the reasons below, the Board finds that summary judgment is appropriate and grants the People's motion for summary judgment. The Board finds that Illinois Fuel violated Sections 12(a) and 12(f) of the Environmental Protection Act (Act) as alleged by the People in Counts III and V of the amended complaint. Having found that Illinois Fuel violated the Act, the Board reviews the statutory penalty factors and determines that a civil penalty of \$100,000 is appropriate for these violations. The People did not move for summary judgment on Count IV, which remains pending. When it issues a final opinion and order, the Board intends to assess a civil penalty of \$100,000 against Illinois Fuel for the violations of Counts III and V and address other remedies requested by the People.

Below, the opinion first provides an abbreviated procedural history of the case before reviewing the factual background. The Board then provides applicable statutory and regulatory provisions. Next, the Board addresses the standard of review, the burden of proof, and the People's request for admissions before discussing the People's motion for summary judgment on Counts III and V of the amended complaint. The Board then discusses remedies before reaching its conclusion and issuing its order.

### **ABBREVIATED PROCEDURAL HISTORY**

On May 16, 2013, the Board accepted the People's amended five-count complaint (Comp.). On June 13, 2013, Illinois Fuel filed its answer and affirmative defenses (Ans.).

On June 16, 2014, the People filed notice that they had served Illinois Fuel with a request for admissions of fact and genuineness of documents. On July 29, 2014, the People filed a motion to deem facts and genuineness of documents admitted by Illinois Fuel (Mot. Deem), attached to which was the People's request (Exh. 1). The motion requested that the Board find that Illinois Fuel had admitted 80 matters of fact (Exh. 1 at 1-10) and the genuineness of seven documents (Exh. 1 at 10-11). Of those documents, the following pertain to the Gallatin County mine and violations alleged in Counts III and V of the amended complaint:

National Pollutant Discharge Elimination System (NPDES) Permit No. IL0061166 issued to Jader Coal Company, Inc. on May 12, 1999 for Mine No. 4 (Exh. D);

Letter from Jader Coal Company, LLC, dated March 1, 2000, requesting transfer of NPDES Permit No. IL0061166 from Jader Coal Company, Inc., with attachments (Exh. E);

Illinois Secretary of State LLC File Detail Report for Jader Coal Company, LLC with status of involuntary dissolution on February 28, 2003 (Exh. F); and

Application dated August 6, 2003 submitted by Illinois Fuel for renewal of NPDES Permit No. IL0061166 held by Jader Coal Company, LLC (Exh. G).

On September 4, 2014, the Board granted the People's unopposed motion to deem facts and genuineness of documents admitted.

On January 21, 2015, the People filed a motion for summary judgment on Counts I, II, III, and V of the amended complaint (Mot. SJ). Accompanying the motion was the affidavit of Mr. Larry Crislip (Aff.), an Illinois Environmental Protection Agency (IEPA) employee who manages the Permit Section of the Mine Pollution Control Program. Illinois Fuel did not respond to the People's motion.

On November 5, 2015, the Board granted the People's motion to stay the proceeding, which the Board later extended at the People's request.

On December 22, 2017, the People filed a motion for joinder requesting that the Board join Cheyenne as a respondent. On the same date, the People and Cheyenne filed a stipulation and proposed settlement of counts I and II of the amended complaint (Stip.). On January 11, 2018, the Board granted the People's motion and joined Cheyenne as a respondent. On February 22, 2018, the Board accepted the proposed settlement of counts I and II of the amended complaint.

## **FACTS**

### **Gallatin County Mine and Permit**

Illinois Fuel operates a coal mine known as Mine #4, which is located five miles southwest of Junction, Gallatin County. Comp. at 1-2, 21 (¶3); Exh. 1 at 7 (¶52); Aff. at 19 (¶14). On May 12, 1999, IEPA issued the mine NPDES Permit No. IL0061166. The permit names Jader Fuel Company, Inc., as both the permittee and the facility. Comp. at 21 (¶15); Ans. at 24 (¶15); Exh. 1 at 7 (¶53); Aff. at 19 (¶15); *see* Exh. D (permit).

On March 1, 2000, Jader Fuel Company, Inc., requested that IEPA transfer NPDES Permit No. IL0061166 to Jader Coal Company, LLC. Exh. 1 at 7 (¶54); Exh. E; Aff. at 19 (¶16). IEPA did not object to the transfer. Comp. at 21 (¶16); Aff. at 19 (¶16). On February 28, 2003, Jader Coal Company, LLC, was involuntarily dissolved by the Illinois Secretary of State. Exh. 1 at 7 (¶55); Aff. at 19 (¶17); Exh. F (LLC File Detail Report).

On August 6, 2003, Illinois Fuel submitted to IEPA an application to renew NPDES Permit No. IL0061166 on behalf of the dissolved Jader Coal Company, LLC, as the permittee. Comp. at 21 (¶18); Ans. at 24-25 (¶18); Exh. 1 at 7-8 (¶56); Aff. at 19 (¶18); *see* Exh. G. The application lists "Jader Coal Company, L.L.C." as applicant and describes the project or facilities covered by the application as "Strip Mining Operation." Exh. G. at 2. IEPA took no action on the application. Comp. at 21 (¶18); Aff. at 19 (¶19). NPDES Permit No. IL 0061166 expired on March 31, 2004. Comp. at 22 (¶20); Exh. 1 at 8 (¶57); Aff. at 19 (¶19).

Illinois Fuel has performed reclamation work at the Gallatin County mine. Exh. 1 at 8 (¶58). Illinois Fuel has not applied to IEPA for an NPDES permit for reclamation activities. Exh. 1 at 8 (¶59). Illinois Fuel has operated the Gallatin County mine without the required permit since March 31, 2004. Comp. at 22 (¶20); Exh. 1 at 8 (¶60); Aff. at 20 (¶20).

NPDES Permit No. IL 0061166 authorized discharges from the Gallatin County mine into waters of the State including Eagle Creek and Little Eagle Creek. Comp. at 21 (¶15); Ans. at 24 (¶15); Exh. 1 at 7 (¶53); Aff. at 19 (¶15); *see* Exh. D. NPDES Permit No. IL0061166 authorized outfalls 008, 009, 012, 016, 017, 018, 019, 020, 040, 043, and 044, each of which is classified as alkaline mine drainage. Exh. 1 at 8-9 (¶¶61-71); Aff. at 20 (¶23); *see* Exh. D.

NPDES Permit No. IL 0061166 imposed the following effluent limitations for outfalls classified as alkaline mine drainage: 1) iron, including a monthly average effluent limit of 3.0 mg/L and a daily maximum effluent limit of 6.0 mg/L, and 2) total suspended solids (TSS), including a monthly average effluent limitation of 35.0 mg/L and a daily maximum effluent limit

of 70.0 mg/L. Exh. 1 at 9 (¶¶72-73); Aff. at 20-21 (¶24); *see* 35 Ill. Adm. Code 406.106(b) (Effluent Standards for Mine Discharges); Exh. D. The permit “also imposes monitoring and reporting requirements on the basis of grab samples.” Comp. at 21 (¶15); Ans. at 24 (¶15); Exh. D.

### **February 2004 – December 2009**

Between February 2004 and December 2009, Illinois Fuel reported to IEPA in Discharge Monitoring Reports (DMRs) the discharge of iron from the Gallatin County mine in excess of 3.0 mg/L, the alkaline mine drainage monthly average effluent limit, on six occasions. Comp. at 23-24 (¶20); Ans. at 27 (¶20); Exh. 1 at 9 (¶75); Aff. at 21 (¶25A); *see* Ans. at 27 (¶20) (denying that limit applies to reclamation activities).

Between February 2004 and December 2009, Illinois Fuel reported to IEPA in DMRs the discharge of iron from the Gallatin County mine in excess of 6.0 mg/L, the alkaline mine drainage daily maximum effluent limit, on one occasion. Comp. at 24 (¶21); Ans. at 28 (¶21); Exh. 1 at 9 (¶76); Aff. at 22 (¶25B); *see* Ans. at 28 (¶21) (denying that limit applies to reclamation activities).

Between February 2004 and December 2009, Illinois Fuel reported to IEPA in DMRs the discharge of TSS from the Gallatin County mine in excess of 35.0 mg/L, the alkaline mine drainage monthly average effluent limit, on 73 occasions. Comp. at 24-26 (¶22); Ans. at 28-30 (¶22); Exh. 1 at 9-10 (¶77); Aff. at 21 (¶25A); *see* Ans. at 27 (¶20) (denying that limit applies to reclamation activities).

Between February 2004 and December 2009, Illinois Fuel reported to IEPA in DMRs the discharge of TSS from the Gallatin County mine in excess of 70.0 mg/L, the alkaline mine drainage daily maximum effluent limit, on 15 occasions. Comp. at 26 (¶23); Ans. at 30 (¶23); Exh. 1 at 10 (¶78); Aff. at 24 (¶25D); *see* Ans. at 30 (¶21) (denying that limit applies to reclamation activities).

### **January 2010 – December 2011**

Between January 2010 and December 2011, Illinois Fuel reported to IEPA in DMRs the discharge of TSS from the Gallatin County mine in excess of 35.0 mg/L, the alkaline mine drainage monthly average effluent limit, on 14 occasions. Comp. at 26-27 (¶24); Exh. 1 at 10 (¶79); Aff. at 24-25 (¶26); *see* Ans. at 30 (¶24) (denying that limit applies to reclamation activities).

Illinois Fuel has not submitted DMRs for the Gallatin County mine to IEPA since the fourth quarter of 2012. Exh. 1 at 10 (¶80).

## **STATUTORY AND REGULATORY PROVISIONS**

Section 3.165 of the Act defines “[c]ontaminant” as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2016).

Section 3.545 of the Act defines “water pollution” as

such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2016).

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 (2016).

Section 12(a) of the Act provides in its entirety that no person shall

[c]ause 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. 415 ILCS 5/12(a) (2016).

Section 12(f) of the Act provides in pertinent part that no person shall

[c]ause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the [Illinois Environmental Protection] Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2016).

Section 402.101 of the Board’s mine-related water pollution regulations defines “mining activities” as:

all activities on a facility which are directly in furtherance of mining, including activities before, during and after mining. The term does not include land acquisition, exploratory drilling, surveying and similar activities. The term includes, but is not limited to, the following:

Preparation of land for mining activities;

Construction of mine related facilities which could generate refuse, result in a discharge or have the potential to cause water pollution;

Ownership or control of a mine related facility;

Ownership or control of a coal storage yard or transfer facility;

Generation or disposal of mine refuse;

Mining;

Opening a mine;

Production of a mine discharge or non-point source mine discharge;

Surface drainage control; and

Use of acid-producing mine refuse. 35 Ill. Adm. Code 402.101 (Definitions).

In addition, Section 402.101 defines an “operator” as “a person who carries out mining activities.” *Id.* Section 402.101 also defines a “person” as “any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” *Id.*

Section 402.101 also defines “reclamation area” as “the surface area of a coal mine which has been returned to the contour required by permit and on which revegetation work has commenced.” 35 Ill. Adm. Code 402.101.

Section 406.106(b) of the Board’s mine-related water pollution regulations establishes effluent standards for mine discharges and provides that,

[e]xcept as provided in Sections 406.109 and 406.110, a mine discharge effluent shall not exceed the following levels of contaminants:

Constituent	Number	Storet Concentration
Acidity	00435	(total acidity shall not exceed total alkalinity)
Iron (total)	01045	3.5 mg/L
Lead (total)	01051	1 mg/L
Ammonia Nitrogen (as N)	00610	5 mg/L
pH	00400	(range 6 to 9)
Zinc (total)	01092	5 mg/L
Fluoride (total)	00951	15 mg/L

Total suspended solids	00530	35 mg/L
Manganese	01055	2.0 mg/L

35 Ill. Adm. Code 406.106(b).

### **DISCUSSION OF PEOPLE’S MOTION FOR SUMMARY JUDGMENT**

The stipulation and settlement between the People and Cheyenne states that it intends to be “a final adjudication of this matter as to Respondent Cheyenne” but “does not resolve the State of Illinois’ case against any other Respondent in this action, except as provided in Section V.E.” Stip. at 1. Section V.E. states in part that “Complainant releases, waives, and discharges . . . Respondent Illinois Fuel from any further liability or penalties for the violations of the Act and Board regulations that were the subject matter of Counts I and II of the Amended Complaint herein.” *Id.* at 9. The People intend to resolve the remaining counts of the amended complaint through the pending motion for summary judgment against Illinois Fuel.

The People argue that Illinois Fuel’s admissions, Mr. Crislip’s affidavit, and the exhibits supporting the motion for summary judgment “contain all material facts necessary to establish liability on Counts I, II, III, and V of the Amended Complaint and the People’s entitlement to relief.” Mot. SJ at 3. The People conclude that, “[s]ince there are no genuine issues of material fact, the People are entitled to a judgment as a matter of law.” *Id.*

The People state that Illinois Fuel’s DMRs include “analyses reported to the Illinois EPA with the required certification that the information is truthful.” Mot. SJ at 17. The People argue that courts have found DMRs to be “conclusive and irrebuttable evidence that violations have occurred.” *Id.*, citing Nat. Res. Def. Council v. Outboard Marine Corp., 692 F. Supp. 801, 819 (N.D. Ill. 1988). The People have not presented as exhibits the DMRs submitted by Illinois Fuel over more than ten years. Instead, the People have summarized those reports in Mr. Crislip’s affidavit, “which contains the substance of what Mr. Crislip would testify to regarding the data in the DMRs.” Mot. SJ at 17. The People do not expect Illinois Fuel “to challenge the accuracy of the effluent concentration values it has diligently reported.” *Id.*

### **Standard of Review**

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When 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.” Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment “is a drastic means of disposing of litigation,” and therefore the Board should grant it only when the movant’s right to the relief “is clear and free from doubt.” Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). “Even so, while the nonmoving party in a summary judgment

motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

### **Burden of Proof**

In an enforcement proceeding before the Board, the burden of proof is by a preponderance of the evidence. People v. Gen. Waste Services, Inc., PCB 07-45, slip op. at 11 (Apr. 7, 2011), citing People v. Cmty. Landfill Inc., PCB 97-193, 04-207 (consol.), slip op. at 13 (Aug. 20, 2009), People v. Blue Ridge Constr. Corp., PCB 02-115, slip op. at 12 (Oct. 7, 2004). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Gen. Waste Servs., slip op. at 11, citing Indus. Salvage Inc. v. County of Marion, PCB 83-173, slip op. at 4 (Aug. 2, 1984).

### **Requests for Admissions**

On June 16, 2014, the People filed notice that they had served respondents with a request for admissions of fact and genuineness of documents. Mot. Deem at 2; Exh. 1. The Board’s procedural rules provide that:

[e]ach of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters, or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. 35 Ill. Adm. Code 101.618(f).

As required by the Board’s procedural rules, the People notified Illinois Fuel that “[f]ailure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.” 35 Ill. Adm. Code 101.618(c); *see* Mot. Deem, Exh. 1 at 1. Illinois Fuel did not respond to the People’s request.

On July 29, 2014, the People filed a motion to deem admitted 80 matters of fact and the genuineness of seven documents. Mot. Deem; *see* 35 Ill. Adm. Code 101.618(a), (d), (e). Illinois Fuel did not respond to the motion. On September 4, 2014, the Board granted the People’s unopposed motion. *See* 35 Ill. Adm. Code 101.500(d), 101.618(f).

On January 21, 2015, the People filed a motion for summary judgment on Counts I, II, III, and V of the amended complaint. Illinois Fuel did not respond and is deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d).



Based on the record, including facts deemed admitted and the documents deemed genuine, and in the absence of any response to the People’s motion, the Board finds that there is no genuine issue of material fact and that summary judgment is appropriate. In the following subsections, the Board reviews the record and makes its findings on the motion for summary judgment on Counts III and V of the amended complaint.

### **Count III**

#### **Allegations**

Count III alleges that, since Illinois Fuel “has operated the Gallatin County mine without an NPDES permit for approximately nine years after the expiration of NPDES Permit No. IL0061166, every discharge of pollutants into receiving waters that has occurred during its control of the facility has been a discharge without a permit.” Comp. at 22 (¶21).

Count III further alleges that, “[b]y failing to submit a NPDES permit and operating the Gallatin County mine without the requisite NPDES permit,” Illinois Fuel violated Section 12(f) of the Act. Comp. at 22 (¶22); *see* 415 ILCS 5/12(f) (2016).

Alternatively, the amended complaint alleges that, if a renewal application prevented the expiration of the NPDES permit, Illinois Fuel remains liable for permit violations alleged in Count IV. Comp. at 22 (¶23).

#### **People’s Motion**

The People argue that, on May 12, 1999, IEPA issued to Jader Fuel Company, Inc., NPDES Permit No. IL0061166, which authorized discharges at outfalls from the Gallatin County mine into waters of the State. The permit named Jader Fuel Company, Inc., as both permittee and the facility. Mot. SJ at 21, citing Comp. at 21 (¶15); Ans. at 24 (¶15); Exh. 1 at 7 (¶53); Exh. D. The People add that, on March 1, 2000, Jader Fuel Company, Inc., requested a transfer of NPDES Permit No. IL0061166 to Jader Coal Company, LLC. Mot. SJ at 21, citing Exh. 1 at 7 (¶54); Aff. at 19 (¶16). On February 28, 2003, Jader Coal Company, LLC, was involuntarily dissolved by the Illinois Secretary of State. Mot. SJ at 21, citing Exh. 1 at 7 (¶55); Exh. F; Aff. at 19 (¶17).

The People argue that, on August 6, 2003, Illinois Fuel submitted to IEPA an application to renew NPDES Permit No. IL 0061166 on behalf of the dissolved Jader Coal Company, LLC, as the permittee. Mot. SJ at 21, citing Comp. at 24-25 (¶18); Ans. at 21 (¶18); Exh. 1 at 7-8 (¶56); Exh. G; Aff. at 19 (¶18). The application lists “Jader Coal Company, L.L.C.” as applicant and describes the project or facilities covered by the application as “Strip Mining Operation.” Exh. G. at 2. Illinois Fuel submitted the application “at the request of the Illinois Department of Natural Resources, which was desirous that Illinois Fuel Company, LLC, complete reclamation work at the abandoned mine.” Ans. at 25 (¶18). On March 31, 2004, NPDES Permit No. IL 0061166 expired. Exh. 1 at 8 (¶57); *see* Exh. D. Illinois Fuel acknowledges that IEPA “took no action in response to the renewal application.” Ans. at 25 (¶18); *see* Comp. at 21 (¶18); Aff. at 19 (¶19).

The People argue that Illinois Fuel has admitted to performing reclamation work at the Gallatin County mine. Mot. SJ at 21. Illinois Fuel's answer states that it "has [been] performing reclamation work abandoned by Jader Coal Company, LLC." Ans. at 25 (§§19, 20); *see id.* at 3 (§3). The People further argue that Illinois Fuel "has not submitted an NPDES permit application to the Illinois EPA for its reclamation activities at the Gallatin County mine." Mot. SJ at 21-22, citing Exh. 1 at 8 (§59). The People conclude that Illinois Fuel "has operated the Gallatin County mine without the required NPDES permit since March 31, 2004." Mot. SJ at 22, citing Exh. 1 (§§57-58, 60); Aff. at 20 (§20).

Since 2004, Illinois Fuel "has monitored discharges at the Gallatin County mine and reported grab samples to the Illinois EPA in the form of DMRs." Mot. SJ at 22, citing Comp. at 23-27 (§§20-24); Ans. at 27-30 (§§20-24); Exh. 1 at 9-10 (§§74-80); Aff. at 20 (§22). The People argue that the DMRs submitted by Illinois Fuel "are based on the expired NPDES Permit No. IL0061166." Mot. SJ at 22, citing Exh. 1 at 9 (§74); Aff. at 20 (§22).

Illinois Fuel's answer denies that it operates the Gallatin County mine but acknowledges that it is "performing reclamation work abandoned by Jader Coal Company, LLC." Mot. SJ at 22; *see* Ans. at 25 (§19). The People cite the Board's mine-related water pollution regulations, which define "mining activities" as "all activities on a facility which are directly in furtherance of mining, including activities before, during and after mining." Mot. SJ at 22, citing 35 Ill. Adm. Code 402.101. The People argue that "reclamation activities which involve discharges from a point source do require an NPDES permit." Mot. SJ at 22.

The People cite the regulatory definition of an "operator" as "a person who carries out mining activities." Mot. SJ at 22, citing 35 Ill. Adm. Code 402.101. The People argue that, because Illinois Fuel is a corporation, it is a "person" under the regulatory definition of that term. Mot. SJ at 22, citing 35 Ill. Adm. Code 402.101. The People further argue that, because Illinois Fuel has admitted performing reclamation and submitting DMRs, it has performed "mining activity" as that term is defined. Mot. SJ at 23, citing 35 Ill. Adm. Code 402.101.

The People argue that Illinois Fuel "has been operating the Gallatin County mine by performing reclamation activities. . . ." Mot. SJ at 20. The People further argue that, as operator of the mine, Illinois Fuel is responsible for discharges from it. *Id.* at 23. Under expired NPDES Permit No. IL0061166, Illinois Fuel "has been submitting DMRs which include discharges into waters of the state since February 2004 through the third quarter of 2012." *Id.* The People argue that it is unlawful for Illinois Fuel "to discharge from the previously permitted Gallatin County mine outfalls into waters of the state without an NPDES permit." *Id.*

The People conclude that, because Illinois Fuel "failed to submit a NPDES permit for its mining activities and is operating the Gallatin County mine without the requisite NPDES permit," it has violated Section 12(f) of the Act. Mot. SJ at 23, citing 415 ILCS 5/12(f) ((2016)). The People conclude that "summary judgment as to Count III of the Amended Complaint is proper." Mot. SJ at 23.

### **Board Determination on Count III**

To prevail on the motion for summary judgement as to Count III, the People must prove that it is more likely than not that Illinois Fuel failed to submit an NPDES permit for the Gallatin County mine and is operating the mine without the required permit. *See* 415 ILCS 5/12(f) (2016); Mot. SJ at 20.

The Gallatin County mine had been permitted under NPDES permit No. IL0061166. Illinois Fuel submitted an application to renew the permit on behalf of the dissolved Jader Coal Company, L.L.C. Exh. G. Illinois Fuel is deemed to have admitted that Jader Coal Company's NPDES Permit No. IL0061166 expired on March 31, 2004. Exh. 1 at 8 (¶57); *see* Exh. D. The record demonstrates that Illinois Fuel has performed reclamation work at the Gallatin County mine and has performed monitoring and submitted DMRs based on the expired Jader permit. Exh 1 at 8, 9 (¶¶58, 74). These actions constitute "mining activities" requiring an NPDES permit. Mot. SJ at 22-23, citing 35 Ill. Adm. Code 402.101.

Illinois Fuel is deemed to have admitted that it has not submitted an NPDES permit application for its reclamation activities at the Gallatin County mine and that it has operated the Gallatin County mine without the required permit since March 31, 2004. Exh. 1 at 8 (¶¶59, 60). The Board finds that Illinois Fuel has therefore violated Section 12(f) of the Act, and the Board grants the People's unopposed motion for summary judgment as to Count III of the amended complaint.

### **Count V**

#### **Allegations**

Count V alleges that Illinois Fuel:

caused or allowed the discharge of iron and TSS into waters of the State so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources. These repeated discharges from the Gallatin County mine in excess of the permitted concentration levels have likely created a nuisance or rendered such waters harmful or detrimental or injurious to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. Comp. at 28 (¶25).

Count V further alleges that, "[b]y so causing or tending to cause water pollution," Illinois Fuel has violated Section 12(a) of the Act. Comp. at 28 (¶26); *see* 415 ILCS 5/12(a) (2016).

#### **Summary of People's Motion on Count V**

The People argue that DMRs between February 2004 and December 2009 show that Illinois Fuel "violated Section 406.106(b) of the Board's Mine Related Water Pollution Regulations and expired NPDES Permit No. IL0061166 by discharging contaminants in excess of the following limits: iron, monthly average limit 6 times and daily maximum limit 1 time; and

TSS, monthly average limit 73 times and daily maximum limit 15 times.” Mot. SJ at 24, citing Comp. at 23-27 (§§20-23); Ans. at 27-30 (§§20-23) (denying that standards cited in amended complaint apply to reclamation activities); Exh. 1 at 9-10 (§§75-78) Aff. at 21-24 (§25).

The People further argue that DMRs between January 2010 and December 2011 show that Illinois Fuel violated Section 406.106(b) of the Board’s Mine Related Water Pollution Regulations and expired NPDES Permit No. IL0061166 by discharging TSS in excess of the monthly average limit 14 times. Mot. SJ at 24, citing Comp. at 26-27 (§§24-25); Ans. at 30 (§24) (denying that standards cited in amended complaint apply to reclamation activities); Exh. 1 at 10 (§79); Aff. at 24-25 (§26).

The People argue that iron and TSS fall within the Act’s definition of “contaminant.” Mot. SJ at 24, citing 415 ILCS 5/3.165 (2016). The People also argue that Eagle Creek and Little Eagle Creek fall within the Act’s definition of “waters.” Mot. SJ at 24, citing 415 ILCS 5/3.550 (2016). The People argue that “the discharges from previously authorized outfalls 008, 009, 012, 016, 017, 018, 019, 020, 040, 043, and 044 are discharges into waters of the state.” Mot. SJ at 24.

The People argue that, by discharging iron and TSS from the 11 listed outfalls at the Gallatin County mine in excess of the standards in Section 406.106(b) of the Board’s Mine Related Water Pollution regulations and expired NPDES Permit No. IL006116, Illinois Fuel has caused or tended to caused water pollution in violation of Section 12(a) of the Act.” Mot. SJ at 23, 24; *see* 415 ILCS 5/12(a) (2016). The People allege that exceeding those limits has “likely created a nuisance or rendered such waters harmful or detrimental or injurious to public health, safety or welfare, or to livestock, wild animals, birds, fish, or other aquatic life.” Mot. SJ at 25. The People conclude that “summary judgment is proper as to Count V of the Amended Complaint.” *Id.*

### **Board Determination on Count V**

To prevail on the motion for summary judgement as to Count V, the People must prove that it is more likely than not that Illinois Fuel caused or tended to cause water pollution at the Gallatin County mine. *See* 415 ILCS 5/12(a) (2016); Mot. SJ at 23.

The Board has reviewed the record including the facts deemed admitted by Illinois Fuel and the verified statements in Mr. Crislip’s affidavit. *See* Exh. 1 at 7-10 (§§52-79); Aff. at 19-25 (§§14-27). It is uncontested that Illinois Fuel operates the Gallatin County mine. Exh. 1 at 7 (§52); Aff. at 19 (§14). The record also demonstrates that expired NPDES permit No. IL0061166 authorized discharges from numerous specified outfalls classified as alkaline mine drainage and established effluent limitations for iron and TSS for discharges from those outfalls. Exh. D at 4. Mr. Crislip’s affidavit summarizes DMRs submitted by Illinois Fuel and reporting discharges of contaminants from the Gallatin County mine that violated the Board’s mine related water pollution regulations and expired NPDES permit No. IL0061166. Aff. at 21-25; Exh. 1 at 9-10 (§§75-80).

Constituents such as iron and TSS are contaminants as defined in the Act. *See* 415 ILCS 5/3.165 (2016). Eagle Creek and Little Eagle Creek are “waters of the State” as defined in the Act. *See* 415 ILCS 5/3.550 (2016); Ans. at 24 (¶15). Discharges from outfalls 008, 009, 012, 016, 017, 018, 019, 020, 040, 043, and 044 at the Gallatin County mine are discharges to the waters of the State. *See* Exh. D at 2. Mr. Crislip’s affidavit summarizes DMRs submitted by Illinois Fuel and reporting 109 discharges of iron and TSS from the Gallatin County mine at concentrations exceeding the Board’s mine-related water pollution regulations and expired NPDES permit No. IL0061166. Aff. at 21-25 (¶¶25-26); Exh. 1 at 9-10 (¶¶75-80).

The Board finds that these discharges of contaminants into the water of the State have more likely than not created a nuisance or rendered those waters of the State harmful or detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. The Board finds that these 109 discharges caused or tended to cause water pollution in violation of Section 12(a) of the Act. The Board grants the People’s unopposed motion for summary judgment as to Count V of the amended complaint.

### **Conclusion on People’s Motion for Summary Judgment**

As it must in deciding a motion for summary judgement, the Board considers the record strictly against the People as the moving party. Having so reviewed the record — including facts deemed admitted by Illinois Fuel and documents deemed genuine — the Board finds that there is no genuine issue of material fact and that summary judgment is appropriate. In reaching this conclusion, the Board has resolved no factual disputes. The Board grants the People’s unopposed motion for summary judgment on Counts III and V of the amended complaint and finds that Illinois Fuel has violated Sections 12(a) and 12(f) of the Act at the Gallatin County mine as alleged by the People.

### **REMEDY**

Having granted the People’s unopposed motion for summary judgment on Counts III and V of the People’s amended complaint, the Board turns to the issue of an appropriate remedy.

### **Relief Requested**

The People request that the Board enter an order directing Illinois Fuel to cease and desist from any further violations of the Act and regulations and assessing a civil penalty. Mot. SJ at 4, 31.

The People also request a Board order providing that, as long as Illinois Fuel “operates the Gallatin County Mine, it shall obtain an NPDES permit and comply with the terms of the expired NPDES Permit No. IL 0061166” until IEPA issues a new NPDES permit. Mot. SJ at 4, 32.

The People also request reasonable costs including attorney’s fees and expert witness costs regarding Count III. Comp. at 23, citing 415 ILCS 5/42(f) (2016). Finally, the People

request that the Board “[g]rant such other and further relief as the Board deems appropriate.” Comp. at 23, 28.

### **Background**

In determining a remedy, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c), 42(h) (2016)). People v. Gilmer, PCB 99-27, slip op. at 6 (Aug. 24, 2000), citing Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164, slip op. at 3 (Apr. 20, 1995); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71, slip op. at 5 (May 10, 1990). The Board considers Section 33(c) factors to determine the unreasonableness of the alleged pollution. Wells Mfg. Co. v. PCB, 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. There is no formula for this determination, and the Board determines an appropriate penalty by reviewing all of the facts and circumstances. Gilmer, slip op. at 6, citing Kershaw, slip op. at 14; Barry, slip op. at 62-63.

Illinois Fuel did not respond to the People’s motion for summary judgment or the People’s arguments on a remedy. The Board therefore has only the People’s arguments on this issue and considers them in the following subsections.

### **Section 33(c)**

In evaluating the record to determine an appropriate remedy, the Board first considers the factors of Sections 33(c) of the Act (415 ILCS 5/33(c) (2016)). Section 33(c) of the Act provides in pertinent part that;

[i]n 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) (2016).

### **Discussion of Section 33(c) Factors**

#### **Character or Degree of Interference with Protection of Health, Welfare, and Property**

The People argue that the character and degree of injury or interference “may be inferred from the sheer number and frequency of the reported effluent exceedances, the extent to which permit limits were exceeded, and the simple repetition of such violations.” Mot. SJ at 26-27.

#### **Social and Economic Value of Pollution Source**

The People acknowledge “that there is some social and economic value to any particular coal mine. . . .” Mot. SJ at 27.

#### **Suitability or Unsuitability of Source to Area**

The People also acknowledge that, by issuing a mining permit, the Illinois Department of Natural Resources determined that the location of the Gallatin County Mine is suitable for mining. Mot. SJ at 27.

#### **Practicability and Reasonableness of Reducing or Eliminating Discharges**

The People argue that Illinois Fuel operated the Gallatin County mine and assumed responsibilities including obtaining an NPDES permit and discharging in compliance with it. Mot SJ at 27. The People also argue that “[i]t is not disputed that it is both practical and reasonable to comply with the NPDES Permits which is demonstrated by the fact that at the time of the permits issuance no appeal was made.” *Id.* The People add that it is “not disputed that it is both practical and reasonable to obtain an NPDES permit.” Mot. SJ at 27.

#### **Subsequent Compliance**

The People’s motion does not address subsequent compliance by Illinois Fuel. *See* Mot. SJ at 26-27.

### **Board Conclusion Regarding Section 33(c) Factors**

Based upon the statutory factors, “there is ample information in the record for the imposition of civil penalties.” Mot. SJ at 27.

The Board has considered the record and weighed the Section 33(c) factors bearing upon reasonableness of the discharges and concludes that the factors justify imposing a civil penalty. In reaching this conclusion, the Board places particular weight on Illinois Fuel’s interference with protection of the health, welfare, and property of the people and on the practicability and reasonableness of obtaining and complying with an NPDES permit.

The Board next considers the factors at Section 42(h) of the Act to determine an appropriate civil penalty.

**Section 42 of the Act**

Section 42(a) of the Act provides in pertinent part that,

[e]xcept as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any order of the Board pursuant to this Act, shall be liable for a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues. 415 ILCS 5/42(a) (2016)

Section 42(b)(1) provides that, notwithstanding subsection (a), “[a]ny person that violates Section 12(f) of this Act or any NPDES permit or term or condition thereof, or any filing requirement, regulation or order relating to the NPDES permit program, shall be liable to a civil penalty of not to exceed \$10,000 per day of violation.” 415 ILCS 5/42(b)(1) (2016).

Section 42(h) of the Act provides that, in determining an appropriate civil penalty under subsections including (a) and (b)(1),

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 this 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;
- (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; and

- (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.

[i]n 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) (2016).

### **Discussion of Section 42(h) Factors**

#### **Board Calculation of Statutory Maximum Penalty**

In calculating an appropriate civil penalty, the Board has stated that the statutory maximum “is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.” Gilmer, slip. op. at 8, citing Barry, slip. op. at 72. Sections 42(a) and (b) of the Act provide the basis to calculate the statutory maximum penalty in this case. 415 ILCS 5/42(a), 42(b) (2016).

Count III alleged violation of Section 12(f) of the Act by operating the Gallatin County mine since March 31, 2004, without obtaining the required NPDES permit. Section 42(b)(1) establishes a maximum penalty of \$10,000 per day of violation of Section 12(f). 415 ILCS 5/12(f), 42(b)(1) (2016). If the violation began April 1, 2004 and continued to January 21, 2015, the date on which the People filed their motion for summary judgment, the violation continued for 3,948 days. Based on that duration, the statutory maximum penalty for a violation of Section 12(f) is \$39,480,000.

Under Count V, the People argue that each of the 109 exceedances of the Board’s water pollution regulations and NPDES permit limits occurring between March 2004 and October 2011 at the Gallatin County mine caused or tended to cause water pollution in violation of Section 12(a) of the Act. Applying Section 42(a) to these violations, the Board calculates the statutory maximum penalty:

Constituent		Number of Exceedances Cited in Affidavit	Statutory Maximum Penalty Per Violation in Dollars	Total Statutory Maximum Penalty in Dollars

Iron	Monthly Average	6	50,000	300,000
Iron	Daily Maximum	1	50,000	50,000
TSS	Monthly Average	87	50,000	4,350,000
TSS	Daily Maximum	15	50,000	750,000
Total		109		5,450,000

Aff. at 19-25; *see* Mot. SJ at 24-25.

Based on the calculations above, the statutory maximum penalty for the violations alleged in Counts III and V of the amended complaint is \$44,930,000. The Board notes the People's request that the Board assess a total civil penalty for these two counts of \$100,000. Mot. SJ at 31.

### **Duration and Gravity of Violation**

The People argue that “the duration and gravity of the violations are clearly evident” from Mr. Crislip's affidavit and the permits attached to it. Mot. SJ at 28. The People add that these materials show Illinois Fuel operated the Gallatin County mine without an NPDES permit from 2004 to the present. Mot. SJ at 28. The People state that verified information attached to the motion for summary judgment shows that, from January 2004 to December 2011, “there have been at least 109 reported exceedances at the Gallatin County mine.” *Id.* at 28-29. The People emphasize “that 14 of those exceedances are alleged to have occurred after filing the Complaint.” *Id.* at 29.

The Board has considered violations occurring after the filing of an initial complaint to be an aggravating factor in a penalty determination. People v. James Lee Watts, individually and d/b/a Watts Trucking Serv. and ESG Watts, Inc., PCB 94-127, slip op. at 11-12 (May 4, 1995), *aff'd sub nom. ESG Watts, Inc. v. PCB*, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996) (ESG Watts). Based on the number of exceedances, their occurrence over ten years, and their continuation after the filing of the original complaint, the Board finds that the duration and gravity of the violations are a significant aggravating factor in determining an appropriate civil penalty.

### **Presence or Absence of Due Diligence**

The People argue that verified information in Mr. Crislip's affidavit shows an absence of due diligence on the part of Illinois Fuels to comply with the Act and regulations. Mot. SJ at 29.

The Board notes that the People's motion for summary judgment and Mr. Crislip's affidavit rely upon DMRs reporting data on discharges from the Gallatin County mine. *See* Mot. SJ at 16-17, Aff. at 3, 20-21. IEPA stresses that Illinois Fuel's DMRs include “sample collection and analyses reported to the Illinois EPA with the required certification that the information is truthful.” Mot. SJ at 17. Mr. Crislip's affidavit states that he compared the data reported in the DMRs with applicable effluent limits. Aff. at 3, 21. From the Gallatin County mine, DMRs show exceedances beginning in March 2004 and continuing to October 2011, more than a year after the filing of the original complaint. Aff. at 19-25. The People argue that DMRs are

“conclusive and irrebuttable evidence that violations have occurred.” Mot. SJ at 17, citing Natl. Res. Def. Council v. Outboard Marine Corp., 692 F. Supp. 801, 819 (N.D. Ill. 1988). In addition, the record does not indicate that Illinois Fuel has sought to “secure relief” such as a variance or an adjusted standard. See 415 ILCS 5/42(h)(2) (2016); see also People v. Packaging Personified, PCB 04-16, slip op. at 36 (Sept. 8, 2011).

The Board agrees with the People that the verified information submitted in Mr. Crislip’s affidavit reflects an absence of due diligence in attempting to achieve compliance or to secure regulatory relief. See People v. Toyal, Inc., PCB 00-211, slip op. at 56-57 (July 15, 2010) (finding non-compliance between 1995 and 2003 aggravates violation and warrants a substantial penalty); *aff’d sub nom.* Toyal v. IPCB, 2012 IL App (3d) 100585, 966 N.E.2d 73. The Board finds this lack of due diligence a significant aggravating factor in determining an appropriate civil penalty.

### **Economic Benefits Accrued**

The People state that economic benefits to Illinois Fuel resulting from “delaying expenditures necessary for compliance have not been quantified.” Mot. SJ at 29.

In People v. Packaging Personified, the Board described one economic benefit of delayed compliance. “‘Delayed’ costs give an unfair advantage to a violator (over competitors that paid to timely comply) because although the violator eventually funds compliance, the money not spent to timely comply was ‘available for other profit-making activities or, alternatively, a defendant avoids the cost associated with obtaining additional funds for environmental compliance.’” People v. Packaging Personified, PCB 04-16, slip op. at 38 (Sept. 8, 2011) (citation omitted); see People v. Packaging Personified, PCB 04-16, slip op. at 30 (Dec. 19, 2013) (reaffirming economic benefit portion of civil penalty amount on partial reconsideration).

The Board has treated the benefit of delayed compliance as an aggravating factor in determining an appropriate civil penalty without quantifying that benefit. In Kershaw, slip op. at 7 (Apr. 8, 1993), the Board did not quantify a benefit but acknowledged the People’s argument that respondents “accrued a substantial economic benefit by not making the improvements necessary” to bring their facility into compliance. The Board found that the civil penalty requested by the People was reasonable. *Id.* In People v. J&F Hauling, PCB 02-21, slip op. at 7 (Feb. 6, 2003), the Board did not quantify an economic benefit but stated that delay in attaining compliance provided one. The Board concluded that the respondent benefitted by devoting resources to income-generating operations instead of compliance. The Board specifically weighed this factor in favor of aggravating the amount of a civil penalty. *Id.*

In People v. Panhandle E. Pipeline Co., PCB 99-191, slip op. at 32 (Nov. 15, 1991) (Panhandle Eastern Pipeline), the respondent argued that any economic benefit from delayed compliance would be exceeded by the cost of necessary emission controls. The Board did not accept this argument: “[t]hat a violator will still incur costs to come into compliance does not eliminate the economic benefit of delayed compliance, *i.e.*, funds that should be spent on compliance were available for other pursuits.” *Id.* The Board also addressed the respondent’s argument that the cost of retrofitting engines had become greater than the cost of installing

emission controls would have been at the time of construction. The Board concluded that this argument conflicted with the deterrent purpose of Section 42 of the Act. The Board stated that

[a]ny extra compliance costs from retrofitting are self-imposed and exist solely because the violator did not pay to comply on time. Applying the retrofit argument could encourage companies to put off compliance or at least not be as diligent as they should be in monitoring compliance - any penalty that a company might face if it gets caught in violation could be diminished because the company did *not* spend money to comply when it should have. *Id.* (emphasis on original).

Having reviewed the record and cases addressing the issue of accruing economic benefits, the Board finds that Illinois Fuel obtained an economic benefit from delayed compliance. The Board considers this benefit an aggravating factor in determining an appropriate civil penalty. The People's motion does not squarely address whether Illinois Fuel has achieved compliance, and the record does not indicate that it has done so. *See* Mot. SJ at 26-27 (addressing Section 33(c) factors). Illinois Fuel may still incur compliance costs, but any future costs would not offset the economic benefit obtained to date and do not cause the Board to change the weight it assigns to this factor.

#### **Penalty Serving to Deter Further Violations**

Under Count III, the People conclude that the appropriate penalty for violations of Section 12(f) at the Gallatin County mine from 2004 through the present is \$50,000. Mot. SJ at 31.

Under Count V, the People conclude that the appropriate penalty for violations of Section 12(a) at the Gallatin County mine is \$50,000. Mot. SJ at 31.

#### **Previously-Adjudicated Violations**

The People acknowledge that Illinois Fuel "has no previous violations of the Act." Mot. SJ at 29. The Board considers this to be a mitigating factor in determining an appropriate civil penalty.

#### **Voluntary Self-Disclosure**

The People state that there was no self-disclosure at issue in this penalty request. Mot. SJ at 29. The Board does not consider this to be either an aggravating or mitigating factor in determining an appropriate civil penalty.

#### **Supplemental Environmental Project**

The People state that there was no supplemental environmental project at issue in this penalty request. Mot. SJ at 29. The Board does not consider this to be either an aggravating or mitigating factor in determining an appropriate civil penalty.

### **Compliance Commitment Agreement**

The People state that there was no compliance commitment agreement at issue in this penalty request. Mot. SJ at 29. The Board does not consider this to be either an aggravating or mitigating factor in determining an appropriate civil penalty.

### **Board Conclusion Regarding Section 42(h) Factors**

In addressing an appropriate civil penalty, the People stress the duration and gravity of the violations and argue that Illinois Fuel showed a lack of diligence in correcting them. The People's motion argues that a total civil penalty of \$100,000 is appropriate for the violations alleged in counts III and V. Mot. SJ at 31.

The People persuasively argue that delaying the expense of compliance resulted in an unspecified economic benefit to Illinois Fuel. The record does not include the exact extent to which Illinois Fuel avoided, as one possible example, the cost of obtaining funds for compliance. Since that amount is separate from costs that may still be necessary to obtain compliance, the Board concludes that the People's recommended penalty includes the economic benefit accrued by Illinois Fuel "because of delay in compliance with requirements." 415 ILCS 5/42(h)(3) (2016). The record does not include evidence or arguments casting doubt on this conclusion, and the People's motion refers specifically to this factor. Mot. SJ at 29.

As noted above, however, the Board places significant weight on the duration and gravity of the violations in this case and on the absence of due diligence on the part of Illinois Fuel to comply or to obtain relief. A lack of due diligence in addressing ten years of serious violations warrants a substantial penalty. While the Board views the absence of previously adjudicated violations as a mitigating factor, it does not offset the significant weight placed on the aggravating factors.

While the Board above calculated a statutory maximum penalty of \$44,930,000, the People argue that a total penalty of \$100,000 is appropriate in part to deter future further violations. Mot. SJ at 29-31. The Board accepts and relies upon the People's position that this penalty provides deterrence and aids in enforcement of the Act. The Board finds that a civil penalty of \$100,000 is appropriate. When it issues a final order in this case, the Board will assess a civil penalty in that amount for the violations alleged in Counts III and V of the amended complaint.

When it issues a final opinion and order, the Board will also address the other relief requested by the People. Under Count III, the People request an award of reasonable fees including attorney's fees and expert witness costs under Section 42(f) of the Act. Comp. at 23 citing 415 ILCS 5/42(f) (2016). Section 42(f) provides in pertinent part that the Board "may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, . . . to the Attorney General in a case where he (sic) has prevailed against a person who has committed a willful, knowing or repeated violation of the Act [or] any permit or term or condition of a permit. . . ." 415 ILCS 5/42(f) (2016). The Board notes that the People have not requested these fees with regard to Count V. Comp. at 28. Although the People

requested an award of fees with regard to Count IV (Comp. at 27), the People did not move for summary judgment on that count.

The People also request that the Board order Illinois Fuel, for so long as it operates the Gallatin County mine, to “obtain an NPDES permit and comply with the terms of the expired NPDES permit No. IL 0061166 mine until such a time that a new NPDES permit is issued by Illinois EPA.” *Id.*

### **CONCLUSION**

As it must in deciding a motion for summary judgment, the Board considers the record strictly against the People as the moving party. Having so reviewed the record — including facts deemed admitted by Illinois Fuel and documents deemed genuine — the Board finds that there is no genuine issue of material fact and that summary judgment is appropriate. In reaching this conclusion, the Board has resolved no factual disputes. The Board grants the People’s unopposed motion for summary judgment on Counts III and V of the amended complaint and finds that Illinois Fuel has violated Sections 12(a) and 12(f) of the Act at the Gallatin County mine as alleged by the People.

After reviewing the record and the People’s arguments on the statutory penalty factors, the Board finds that a civil penalty of \$100,000 is appropriate for the violations alleged in Counts III and V of the amended complaint. When it issues a final opinion and order, the Board will direct Illinois Fuel to pay a civil penalty in that amount.

While the People have requested that the Board award costs under Section 42(f) of the Act, the record does not now address this issue. In its order below, the Board directs its hearing officer to proceed to hearing on Count IV of the amended complaint, which remains pending before the Board. The Board also directs the hearing officer to establish deadlines for filings and responses on an award of costs under Section 42(f) if the People wish the Board to consider one. The Board intends that its final opinion and order will address both the pending Count IV and the remaining requests for remedies.

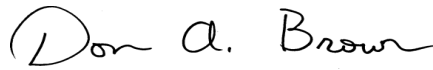
### **ORDER**

1. The Board grants the People’s unopposed motion for summary judgment and finds that Illinois Fuel Company, LLC, violated Sections 12(a) and 12(f) of the Environmental Protection Act (415 ILCS 5/12(a), (f) (2016)) as alleged in Counts III and V of the amended complaint.
2. The Board directs its hearing officer to proceed to hearing on Count IV of the amended complaint, which remains pending before the Board.
3. The Board directs its hearing officer to establish deadlines for filings and responses on an award of costs under Section 42(f) of the Act if the People wish the Board to consider one.

IT IS SO ORDERED.

Board Member B.K. Carter abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on July 25, 2019, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk  
Illinois Pollution Control Board