

3). On December 15, 2020, the Board received the transcript (Tr.2). On December 22, 2020, the People submitted an addendum to its post-hearing brief.

DISCUSSION

The Board's procedural rules prescribe the contents for stipulations and settlements. *See* 35 Ill. Adm. Code 103.302. These requirements include stipulating to facts on the Respondents' operations as well as the extent and causes of the alleged violations. The parties argue that they negotiated a settlement addressing all of the content requirements. People Br. at 4; Resp. Br. at 3.

In the first public comment, Mr. Borries, Mr. Tony Kreke, and Mr. Dan Kreke find it "unacceptable" that the settlement includes a non-admission of violations. PC1 at 1. However, the People argue that an admission of guilt is not required. The Board agrees that a settlement need not include an admission of guilt and the Board need not find a violation to accept a settlement. *See* 35 Ill. Adm. Code 103.302; Chemetco v. PCB, 140 Ill. App. 3d 283, 288 (5th Dist. 1986).

When it examines the record, the Board considers the factors of Sections 33(c) and 42(h) of the Environmental Protection Act (Act) (415 ILCS 5/33(c), 42(h) (2018)) to determine whether a stipulation and settlement is appropriate. People v. Alloy Engineering and Casting Co., PCB 01-155, slip op. at 4 (July 10, 2003). Below, the Board finds that the settlement meets the requirements of Section 103.302 of the Board's procedural rules. First, the Board discusses Section 33(c) factors. Next, the Board discusses Section 42(h) factors. Finally, the Board makes its determination, accepts the settlement, and issues its order.

Section 33(c) Factors

Section 33(c) of the Act (415 ILCS 5/33(c) (2018)) provides that the Board's final order must consider all facts and circumstances bearing on the reasonableness of emissions, discharges or deposits involved. The settlement discusses the nature, extent, and cause of the alleged violations. Settlement at 4, 5, 6-7. It also addresses the nature of the landfill's operation and control equipment. *Id.* at 2, 6-7. Further, the settlement addresses future compliance. *Id.* at 9. Below, the Board discusses the Section 33(c) factors.

Injury or Interference

Section 33(c) of the Act requires that the Board must consider the "character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people." 415 ILCS 5/33(c)(i) (2018). Mr. Borries stated that he had never complained about the landfill until May 29, 2017. Tr..1 at 8. On that date, he went to the back of his property bordering a tributary stream and witnessed toxic, contaminated water. *Id.* He stated that everything in the stream was dead and that it "smelled horrible." *Id.*

Mr. Borries argued that harm to the environment and wildlife was greater than the parties described. Tr.1 at 10. Specifically, he alleged that for over a quarter of a mile there was nothing

living in the stream. *Id.* He stated that he found dead crawdads, worms, and frogs. *Id.* at 11. In his second comment, Mr. Borries cited an Illinois Department of Natural Resources report assessing the fish kill and argued that limited visibility caused by effluent in the stream obscured the extent of harm. The People acknowledge that *at least* 184 fish died because of the leachate release. People Br. at 7-8, citing Settlement at 6.

Social and Economic Value of Pollution Source

Section 33(c) of the Act also requires the Board to consider “the social and economic value of the pollution source.” 415 ILCS 5/33(c)(ii) (2018). The parties state that Respondents’ landfill provides “social and economic benefit.” Settlement at 5.

Suitability of Landfill for the Area

Section 33(c) also requires the Board to consider the “suitability or unsuitability of the pollution source to the area...” 415 ILCS 5/33(c)(iii) (2018). Here, Mr. Borries and his family moved to their home one-half mile east of the Facility in 1987. Tr.1 at 8. The landfill was present when they moved to the home. *Id.* In the first public comment, Mr. Borries, Mr. Tony Kreke, and Mr. Dan Kreke argue that the area is not suitable because of the running water surrounding it. PC 1 at 2.

The People argue that the local county or board or municipal governing body has authority to approve a landfill site. People Br. at 7. Any challenge to that approval had to be made within 35 days and only by specified parties. *Id.*, citing 415 ILCS 4/40.1(b) (2018). The People add that the Facility was permitted in 1996. People Br. at 7, citing Complaint at 2.

Practicability and Reasonableness of Reducing or Eliminating Discharges

Section 33(c) of the Act also requires the Board to consider the “technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source.” 415 ILCS 5/33(c)(iv) (2018). The parties’ settlement argues that installing measures to prevent equipment failures that result in releasing leachate “was both technically practicable and economically reasonable.” Settlement at 5. However, Mr. Borries believes that the landfill should have better protected its equipment from potential trespassers or saboteurs. Tr.1 at 9.

Respondents’ Subsequent Compliance with the Act and Board Regulations

Section 33(c) of the Act requires the Board to consider “any subsequent compliance” when making its determination concerning the reasonableness of emissions, discharges, or deposits. 415 ILCS 4/33(c)(v) (2018). Mr. Borries argues that leachate was not properly cleaned up following the release. *See* Tr. at 11, 12; PC1 at 4, 5-7. However, the People argue that Mr. Dustin Burger, an Illinois Environmental Protection Agency (IEPA) specialist, inspected the unnamed tributary on three different occasions. People Br. at 6. On June 1, 2017, Mr. Burger observed that the ditch had been excavated and no leachate remained in the ditch. *Id.* The same day, the Facility operator showed Mr. Burger a video of the excavation work. *Id.* Mr. Burger

also did not observe any leachate in the unnamed tributary. *Id.* In addition, Respondents have also taken steps to prevent future releases. For example, Respondents spent \$255,135.50 on upgrading the Facility's leachate control pipelines. Settlement at 4. Further, the Facility installed a "lock-out" system and placed control equipment inside a locked shed on Facility grounds. *Id.*

Board Discussion

Having considered the Section 33(c) factors, the Board places particular weight on the injury to or interference with the protection of health, welfare, and property. The parties stipulate that the leachate released from the Respondents' facility harmed the environment, "as evidenced by the fish kill which occurred in the unnamed tributary to Salt Creek." Settlement at 5. The Board concludes that these factors support a civil penalty in this case, and the following section of this opinion considers Section 42(h) of the Act to determine the appropriate amount of a penalty.

Section 42(h) Factors

In determining the appropriate civil penalty to be imposed, the Board is authorized to consider any matter of record in mitigation or aggravation of penalty, including eight statutory factors. 415 ILCS 5/42(h) (2018). Below, the Board considers the Section 42(h) factors.

Duration and Gravity of the Violation

In determining the appropriate civil penalty to be imposed under Section 42(h), the Board is authorized to consider the "duration and gravity of the violation." 415 ILCS 5/42(h)(1) (2018). Mr. Borries does not believe that the landfill cleaned up the leachate from the tributary. Tr.1 at 11. He and other neighboring landowners went to the tributary several days after the fish kill and observed "pooled up, black contaminated water setting in all of the low spots of this tributary." *Id.* at 12. Mr. Borries stated that the stream was not running and that it remained stagnant until the contamination either evaporated or soaked into the stream bed. *Id.* Mr. Borries adds that he went to the creek every morning for two weekends after the fish kill and observed that the leachate was not cleaned up. *Id.* at 13. However, two or three weeks after the fish kill, it rained enough to wash the contamination into salt creek. *Id.* at 12. Mr. Borries is also concerned that the landfill did not notify any of the neighboring landowners of the leachate. *Id.* at 11. On the other hand, Respondents argue that they removed the leachate expeditiously.

Respondents' Diligence in Compliance with the Act and Board Regulations

In determining the appropriate civil penalty, Section 42(h) also authorizes the Board to consider "the presence or absence of due diligence on the part of the respondent in attempting to comply with the requirements of this Act..." 415 ILCS 5/42(h)(2) (2018). Mr. Borries does not believe that the landfill acted immediately to clean up the leachate. Tr.1 at 9-10; *see* PC 1 at 2. He argues that no documentation supports Respondents' contention that it cleaned the unnamed tributary. PC1 at 2. The People respond that this documentation is not required to be included in a settlement and is typically not included in them. People Br. at 8.

However, respondent argues that it “took immediate action to stop the release of leachate from the Facility after being informed by IEPA of its occurrence.” Resp. Br. at 3-4, citing Settlement at 6, 7. The People stress that an IEPA inspector inspected the site three times and observed that excavation work had taken place and no leachate was present. People Br. at 8.

The People also discuss preventative steps Respondents have taken to prevent future leachate. People Br. at 6. Respondents spent \$255,135.50 on upgrades to the facility’s leachate control. *Id.* In addition, Respondents installed a “lock-out” system and placed control equipment for the Facility inside a locked shed on Facility grounds.

Economic Benefits of Delayed Compliance

Section 42(h) of the Act allows the Board to consider “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.” 415 ILCS 5/42(h)(3) (2018). The parties’ settlement states that the proposed civil penalty “takes into account any economic benefit realized by the Respondents as a result of avoided or delayed compliance.” Settlement at 7.

Amount of Monetary Penalty Assessed

Section 42(h) also allows the Board to consider “the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance...” 415 ICLS 5/42(h)(4) (2018). Mr. Borries believes that a penalty of \$18,000 is a “slap on the wrist” for the seriousness of the leachate discharge. Tr. at 12.

The People argue that the Section 42(h) factors supports a civil penalty of \$18,000. *Id.* at 9. Furthermore, the Section 42(h) factors are not exhaustive and other factors are also considered in determining a civil penalty. *Id.* Here, the People argue that Respondents engaged in good faith efforts such as incurring considerable expenses to install preventative measures. *Id.* Furthermore, the People argue that Mr. Borries did not provide any new facts for consideration of a higher penalty in this matter. *Id.*

The People state that, although the Act allows for \$50,000 civil penalty per violation and \$10,000 per day of each violation, these are maximum amounts. People Br. at 8. Further, because these are maximum amounts, the People argue that the Act requires weighing multiple factors to determine the appropriate penalty. *Id.*

The Board also considers a Respondent’s good faith when assessing a monetary penalty. Illinois EPA v. Barry, PCB 88-71, slip op. at 26 (May 10, 1990). “Good faith” efforts include hiring engineers and installing pollution control equipment. *Id.* Here, Respondents installed upgrades at an expense of \$255,135.50.

Previously Adjudicated Violations of the Act

Section 42(h) also allows the Board to consider the “number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent.” 415 ILCS 5/42(h)(5) (2018). Mr. Borries alleged previously adjudicated violations of the Act that the settlement did not address. PC2 at 1. The People reported that the Facility has been the subject of four previous administrative citations: AC00-73, AC01-03, AC 07-06, and AC07-72. People Add. at 3. These citations alleged violations of Section 21(o)(5) of the Act (415 ILCS 5/21(o)(5) (2018)) or Section 21(o)(12) of the Act (415 ILCS 5/21(o)(12) (2018)), which are not alleged in this case. *Id.*

Mr. Borries also refers to two violation notices issued by the Illinois EPA on September 18, 2018, and June 8, 2020. PC2 at 13-14. The People responded that these notices do not adjudicate violations. People Add. at 4. Instead, violation notices afford Respondents the opportunity to resolve an alleged violation with the IEPA. *Id.*

This settlement relates to wholly past violations detailed in the complaint and does not shield any respondent from an enforcement action if violations occur in the future. The settlement notes that it may be used against Respondents in a subsequent enforcement action or permit proceeding as proof of a past adjudication of violation of the Act and Board regulations. Settlement at 4.

Other Statutory Factors

The settlement states that “[s]elf-disclosure is not at issue in this matter.” Settlement at 7; *see* 415 ILCS 5/42(h)(6) (2081). It also states that Respondents did not pursue a Supplemental Environmental Project. Settlement at 7; *see* 415 ILCS 5/42(h)(7). Finally, although Respondents proposed a Compliance Commitment Agreement, IEPA rejected it. Settlement at 7; *see* 415 ILCS 5/42(h)(8). The Board does not weigh these as either aggravating or mitigating factors in determining an appropriate civil penalty.

Discussion

Based on his comments cited above, Mr. Borries does not believe a fine of \$18,000 adequately addresses the seriousness of this release. *Id.* However, the People argues that the Board should accept the settlement. The People argue that “prompt resolution of enforcement action is a matter of substantial significance to the Board.” People Br. at 4, citing IEPA v. Loeb, PCB 91-123 (Apr. 9, 1992). Respondents argue that the public comments provide no legal basis for disapproving the settlement. Resp. Br. at 5. Respondents also argue that approving the settlement promotes the policy of settling cases where appropriate. *Id.* at 7.

The Board notes that the proposed settlement represents the Parties’ negotiation covering issues including compliance and a civil penalty. The Board applauds Mr. Borries’ vigilance in monitoring this release, and it shares his commitment to the environment.

The primary goal of the Act is to enhance the environment. Chemetco v PCB, 140 Ill. App. 3d at 288. Additionally, the law also encourages settlements. *Id.* Considering both of these objectives together, settlement allows the People and Respondents to conserve resources

that otherwise would be spent in litigation, effectuates the goals of the Act, and avoids the stigma of a violation. See People v. Archer Daniels Midland, 140 Ill. App. 3d at 825.

The Board considers the gravity of the alleged violations to have been significant, but the record persuades the Board that the proposed civil penalty of \$18,000 will deter future violations. Specifically, the Board is persuaded by Respondents' prompt cleanup of the leachate and extensive improvements to prevent future violations. The Board recognizes that the parties' proposed settlement does not include every element that participating members of the public would wish. However, after considering the record in this case and the statutory factors it must consider in determining whether to accept the parties' proposed settlement, the Board finds that the proposed settlement satisfies Section 103.302 of the Board's procedural rules. Having considered the factors in Sections 33(c) and 42(h) of the Act, the Board concludes that the proposed civil penalty of \$18,000 is appropriate.

CONCLUSION

For the reasons above, the Board accepts the parties' stipulation and proposed settlement.

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

ORDER

1. The Board accepts and incorporates by reference the stipulation and proposed settlement.
2. Respondents must pay a civil penalty of \$18,000 no later than April 5, 2021, which is the first business day following the 30th day after the date of this order. Respondents must pay the civil penalty by certified check or money order payable to the Illinois Environmental Protection Agency for deposit into the Environmental Protection Trust Fund. The case name and case number must appear on the certified check or money order.
3. Respondents 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

Respondents must send a copy of the certified check, money order and any transmittal letter to:

Daniel Robertson
Assistant Attorney General
Environmental Bureau

Illinois Attorney General's Office
 69 W. Washington Street, Suite 1800
 Chicago, Illinois 60602

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2018)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2018)).
5. Respondents 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.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Office of the Attorney General Attn: Daniel Robertson 69 West Washington Street Suite 1800 Chicago, IL 60602 drobertson@atg.state.il.us	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 4, 2021, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board