

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**PEOPLE OF THE STATE OF ILLINOIS,** )  
**by KWAME RAOUL, Attorney General** )  
**of the State of Illinois,** )  
) )  
**Complainant,** )  
) )  
**v.** )  
) )  
**IRONHUSTLER EXCAVATING, INC.,** )  
**an Illinois corporation, and** )  
**RIVER CITY CONSTRUCTION, LLC,** )  
**an Illinois limited liability company.** )  
) )  
**Respondents.** )

**PCB No. 20-16**  
**(Enforcement - Land)**

**NOTICE OF FILING**

To: See attached Certificate of Service.

PLEASE TAKE NOTICE that on June 3, 2021, I filed with the Office of the Clerk of The Pollution Control Board this Notice of Filing and Complainant’s Reply to Ironhustler Excavating, Inc.’s Cross-Motion for Summary Judgment and Response to Complainant’s Motion for Summary Judgment, copies of which are hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS  
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ATTORNEY GENERAL

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	)	<b>(Enforcement - Land)</b>
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<b>an Illinois corporation, and</b>	)	
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**COMPLAINANT’S REPLY TO IRONHUSTLER’S  
CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO  
COMPLAINANT’S MOTION FOR SUMMARY JUDGMENT**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, states as follows for its reply to Ironhustler Excavating, Inc.’s (“Ironhustler”) Cross-Motion for Summary Judgment and Response to Complainant’s Motion for Summary Judgment filed on May 12, 2021 (“Cross-Motion and Response”):

**INTRODUCTION**

Much of Ironhustler’s Cross-Motion and Response is directed to the argument that, even if its employees and subcontractors did conduct open dumping of general construction or demolition debris at the Venovich Construction property (“Disposal Site”), no civil penalty should be imposed. Ironhustler argues that it should avoid a penalty because, after Illinois EPA detected the open dumping, Ironhustler cleaned up the waste. That the Board already has imposed civil penalties on Ironhustler for open dumping violations—and ordered it to cease and desist from future violations—in two prior cases, PCB 2012-021 and AC 2019-017, is, in Ironhustler’s view, immaterial. Cross-Motion and Response at 23. Ironhustler’s position that civil penalties should

**decline** as it accrues even more violations for failing to prevent “diversion” of its waste to yet another open dump site ignores the General Assembly’s mandate that the Board consider previously adjudicated violations in “determining the appropriate civil penalty to be imposed” for violations of the Act. 415 ILCS 5/42(h)(5) (2018). It is nonsensical that civil penalties would be assessed against Ironhustler in the Board’s prior two enforcement matters, but not in this third case. To the contrary, Ironhustler’s repeated violations over the past decade strongly advocate for a very significant monetary penalty in this third case.

Ironhustler also argues that Complainant has failed to prove that the demolition debris its employees and subcontractors disposed of was general construction or demolition debris, and that Ironhustler is therefore entitled to judgment as a matter of law. Ironhustler ignores the photographic evidence submitted by the Complainant demonstrating that open dumped debris across the entire Disposal Site was contaminated with metal, brick, and other substances, and therefore was general construction or demolition debris. Complainant has submitted more than sufficient evidence to entitle it to judgment in its favor as a matter of law.

### **IRONHUSTLER'S CROSS-MOTION LACKS ANY FACTUAL BASIS**

The basis of Ironhustler’s cross-motion for summary judgment can be found at the top of page 10 of the Cross-Motion and Response:

. . . Complainant has the burden to establish that the diverted materials were made up of “general construction or demolition debris” or “waste,” as those terms are defined by the Act (415 ILCS 5/3.160(a) and 415 ILSC 5/3.535, respectively). Complainant cannot meet its burden.

A review of the pleadings and exhibits on file quickly refutes this argument.

Ironhustler concedes, at the bottom of page 10 of the Cross-Motion and Response, that the sworn affidavit of the Illinois EPA inspector, Jason Thorp, who personally visited the Disposal Site on July 13, 2017, stated the demolition debris he observed was general construction or

demolition debris. Complainant's Motion, Exhibit A, ¶¶ 2-3. Inspector Thorp did not assume or speculate. He noted his observations and took photographs to document his observations, which Complainant attached to its Motion. Ironhustler makes no mention of the July 13, 2017 inspection photographs in its Cross-Motion and Response. The photographs demonstrate that the waste present at the Disposal Site was not clean construction or demolition debris, but instead "contained electrical wire, metal radiators, wood, rebar, wire conduit, metal sheeting, metal angle iron, painted brick, plywood, metal studs, metal pipe, painted concrete, slag, and ceramic tile," just as Inspector Thorp averred in his affidavit. Complainant's Motion, Exhibit A, ¶ 3.

Clean construction or demolition debris ("CCDD") is defined in Section 3.160(b) of the Act, 415 ILCS 5/3.160(b) (2018), as follows:

- (b) "Clean construction or demolition debris" means uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities.

In all, Complainant's Motion included 46 photographs taken by Inspector Thorp during his July 13, 2017 inspection that demonstrate contaminated material throughout the entire Disposal Site, including, among many others, the following relevant notes:

- Photo 2: "depicts demolition debris not meeting the definition of CCDD as it contained electrical wire and a metal radiator."
- Photo 4: "depicts demolition debris not meeting the definition of CCDD as it contained wood and rebar."
- Photo 5: "depicts demolition debris not meeting the definition of CCDD as it contained wire conduit, metal sheeting, metal angle, painted brick, plywood, wood and rebar."
- Photo 6: "depicts demolition debris not meeting the definition of CCDD as it contained electrical wire, metal radiator, wood and rebar."
- Photo 7: "depicts demolition debris not meeting the definition of CCDD as it contained wire conduit, electrical wire, metal sheeting and wood."

- Photo 8: “depicts demolition debris not meeting the definition of CCDD as it contained metal, metal sheeting and wood.”
- Photo 9: “depicts demolition debris not meeting the definition of CCDD as it contained a chair base, metal sheeting, metal pipe, wood and rebar.”
- Photos 15-19 and 26-36 depict general construction or demolition debris along and in the Mackinaw River.

Exhibit M of Ironhustler’s Cross-Motion and Response includes Inspector Thorp’s July 13, 2017 inspection report. IHX-000272-000304. Complainant encourages the Board to consider this report in its entirety. Inspector Thorp’s report explains in detail what he observed at the Disposal Site. For example, Inspector Tharp stated:

Digital photographs 1 through 36 were collected at the disposal site. Digital photographs 1 through 14 depict an overview of the demolition debris not meeting the definition of CCDD. Digital photographs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 depict a closer view of the demolition debris not meeting the definition of CCDD. The demolition debris contained electrical wire, metal radiators, wood, rebar, wire conduit, metal sheeting, metal angle iron, painted brick, plywood, metal studs, and a chair base.

Digital photographs 15, 16, 17, 18, and 19 depict a closer view of the demolition debris along the Mackinaw River not meeting the definition of CCDD. The demolition debris contained slag, brick, painted concrete, and metal rebar.

IHX-000274. Moreover, Inspector Tharp’s report includes a map depicting the location where he took each of the numbered photographs. IHX-000280. A comparison of each photograph with the location it was taken demonstrates that contaminated general construction or demolition debris was present throughout the entire Disposal Site. Photographs 1 through 19 depict open dumping on the western side of the Disposal Site, photographs 27 through 36 depict open dumping in a central portion of the Disposal Site, and photographs 21 through 26 depict open dumping on the eastern side of the Disposal Site. The photographs demonstrate that general construction or demolition was present throughout each area. *Id.*

Inspector Tharp's photographs and map disprove Ironhustler's arguments against liability. Ironhustler begins its Response and Cross-Motion with a new assertion concerning five truckloads of material that supposedly "pre-date" the at-least twenty-four truckloads of construction or demolition debris hauled to the Disposal Site at Ironhustler's direction. We know of these twenty-four truckloads of waste going to the Disposal Site because Ironhustler provided the time sheets for the truckers it hired. Cross-Motion and Response, Exhibit J, IHX-000043-000046. No further information is provided about these supposed five additional truckloads even though Ironhustler claims there is "undisputed evidence" of them. *Id.* at 1. When were these trucks sent to the Disposal Site? Who sent the trucks to the Disposal Site? What did the truckloads contain? How would Ironhustler know that these trucks "pre-dated" Ironhustler's disposal? *Id.* Ironhustler leaves us in the dark.

Apparently, Ironhustler surmises the existence of these five truckloads solely because its records show that twenty-nine truck loads were subsequently taken to the landfill from the Disposal Site. This fact, alone, proves nothing. The twenty-nine truck loads removed could have included surrounding soils from the Disposal Site excavated during the removal of Ironhustler's general construction or demolition debris. Ironhustler or its subcontractors may not have accurately documented all of the waste they brought to the Disposal Site. The supposed discrepancy of five truckloads does not make it any more or less likely that Ironhustler caused or allowed open dumping of all the waste at the Disposal Site, and therefore is irrelevant. *See* Ill. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Even more baffling is the factual scenario Ironhustler’s arguments imply. As discussed above, Inspector Tharp’s photographs show general construction or demolition debris scattered in and among all of the debris present at the Disposal Site. It is not as if there were one small area of general construction or demolition debris from an unknown source, and then a much larger area of clean construction or demolition debris from Ironhustler. Ironhustler apparently asks the Board to make a speculative leap from the supposed “five truckload” discrepancy to a scenario where Ironhustler and its subcontractors lawfully mixed twenty-four truckloads of clean construction or demolition debris in with five truckloads of general construction or demolition debris that had been deliberately and sparsely spread across a large disposal site—without any corroborating evidence. Such absurd speculation cannot defeat summary judgment. “A trial court need not strain hard to adduce some remote factual possibility to defeat a motion for summary judgment.” *Gehrman v. Zajac*, 34 Ill. App. 3d 164, 166 (1st Dist. 1975); *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744 (1st Dist. 2004) (“Unsupported assertions, opinions, and self-serving or conclusory statements . . . are not admissible evidence upon a review of a summary judgment”).

### **IRONHUSTLER CONCEDES ITS EMPLOYEES WERE RESPONSIBLE**

According to Ironhustler’s Statement of Uncontested Facts at pages 3 to 4 of the Cross-Motion and Response:

- On July 14, 2017, the day after the first Illinois EPA inspection, Ironhustler received time cards showing the truck loads “diverted” to the Disposal Site.
- Ironhustler terminated the employment of its employees involved in the diversion.
- Ironhustler implemented new policies to prevent future diversion of waste by its employees from lawful disposal facilities.

Ironhustler’s Response to Complainant’s Statement of Uncontested Facts adds at pages 7 to 9:

- One of Ironhustler’s employees authorized the diversion of the demolition debris to the Disposal Site.
- The employees of Ironhustler who were involved in the diversion of the demolition debris to the Disposal Site are no longer employed.
- Tim Dehart, Ironhustler’s superintendent of the Delavan CUSD No. 703 project, was terminated because of his role in the diversion.

Ironhustler concedes its employees were responsible for the open dumping of general construction demolition debris at the Disposal Site.

### **IRONHUSTLER WAS GIVEN PROPER PRE-ENFORCEMENT PROCESS**

Ironhustler alleges Illinois EPA failed to follow proper procedures by refusing the issuance of a Compliance Commitment Agreement (“CCA”) before Ironhustler’s written response to the violation notice was due. Cross-Motion and Response at 5. This is inaccurate and misleading—and completely irrelevant. This action was brought on the Attorney General’s own motion, in addition to being at the request of Illinois EPA. *See* Complaint at Count I, ¶ 1. “The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act on the Attorney General’s own motion regardless of the Agency’s actions.” *People v. Barger Engineering, Inc.*, PCB 06-82 (Mar. 16, 2006), slip op. at 6.

Nevertheless, the record demonstrates that Illinois EPA fully complied with Section 31 of the Act. Exhibit Q to the Response and Cross-Motion is a copy of Illinois EPA’s September 28, 2017 Notice of Non-Issuance of CCA (“NNI”). IHX-000349. The September 28, 2017 NNI expressly states to be in response to Ironhustler’s September 22, 2017 letter, not the September 27, 2017 letter, as Ironhustler implies. Ironhustler’s September 22, 2017 letter to Illinois EPA is included with Exhibit O. IHX-000317. It is stamped as received on September 22, 2017. Ironhustler’s counsel and Illinois EPA’s regional office are both located in Peoria.

Ironhustler subsequently sent additional response letters to Illinois EPA dated September 27, 2017 (Exhibit O, IHX-000315-000316) and November 9, 2017 (Exhibit R, IHX-000356-000359). Illinois EPA responded to the November 9, 2017 letter with a further NNI dated November 13, 2017. Exhibit T, IHX-000362. Ironhustler's September 22, 2017 initial response was rejected on September 28, 2017. It then requested a meeting, which was held, and submitted an additional response, which was again rejected. Ironhustler was given more than adequate pre-enforcement process in this case.

### **THE CIVIL PENALTY REQUESTED IS REASONABLE**

Ironhustler's argument that it should not be assessed any penalty is meritless, as the case law demonstrates. In *ESG Watts, Inc. v. Pollution Control Board*, 282 Ill. App. 3d 43 (4th Dist. 1996), a landfill owner appealed the decision of the Board imposing a \$60,000 penalty for the operator's failure to timely pay solid waste fees and to timely submit various reports required by the Act and associated regulations. The Appellate Court determined the penalty was not excessive and the Board did not err in its consideration of prior violations in aggravation of penalty. *Id.* at 52-55. *ESG Watts, Inc.* was an appeal from the Board's opinion in *People v. Watts*, PCB 94-127 (May 4, 1995).

The Act authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution. *ESG Watts, Inc.*, 282 Ill. App. 3d at 51 (citations omitted). Illinois courts have sometimes stated that the primary purpose of civil penalties is to aid in enforcement of the Act, and punitive considerations are secondary. *Id.* at 52 (citations omitted). Some decisions which predate section 42(h) of the Act seem to suggest that when compliance has been achieved, penalties are unnecessary. *See, e.g., City of Moline v. Pollution Control Board*, 133 Ill. App. 3d 431, 433 (3rd Dist. 1995). *Id.* (relied upon by Ironhustler at pages

12-13 of its Cross-Motion and Response). “However, it is now clear from the 42(h) factors that the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider when imposing penalties.” *Id.* In *People v. Watts*, the Board also took notice of prior administrative violations as a factor in aggravation which was subsequently approved by the Appellate Court. *ESG Watts, Inc.*, 282 Ill. App. 3d at 54-55.

Like Ironhustler in this case, Respondents in *People v. Watts* argued before the Board that, since they were now in compliance, there was no need for an assessment of civil penalties. PCB 94-127 (May 4, 1995), slip op. at 14. The Board responded:

Respondents have made business decisions not to comply in the past with the Act and Board regulations; therefore, the Board believes a penalty is necessary to deter future violations. The Board will assess a penalty which will dissuade ESG Watts from such future business decisions which result in violations.

*Id.* at 14-15.

Ironhustler argues at page 3 of its Cross-Motion and Response that “management” was not aware of the “diversion” of the demolition debris until the initial Illinois EPA inspection on July 13, 2017. Even if accepted at face value, this assertion is exactly why a significant civil penalty is warranted. A trucking company was hired and instructed to take at least twenty-four truckloads of general construction or demolition debris to the Disposal Site. Cross-Motion and Response, Exhibit J, IHX-000043-000046. An Ironhustler dozer was transported to the Disposal Site to further effectuate the illegal disposal of debris. Complainant’s Motion, Exhibit A, Attachment 1, July 13, 2017 Inspection Photographs, Photo 20.

The Ironhustler employees responsible for supervising the Delavan CUSD No. 703 project were Rob Frederick, Project Manager for the project, and Tim DeHart, Superintendent for the project. Complainant’s Motion, Exhibit “C” at Nos. 2, 5 and 8. Corey Miller, formerly employed as an operator by Ironhustler, operated the John Deere 650H dozer observed at the Disposal Site

on July 13, 2017. Complainant's Motion, Exhibit "A" and Exhibit "C", No. 9. The John Deere 650H dozer was transported to the Disposal Site by former Ironhustler truck driver, Jim Fitz. Complainant's Motion, Exhibit "C", No. 9. Tim DeHart, the former superintendent for Ironhustler, was terminated from his employment as a result of his role in the open dumping of GCDD at the Disposal Site. Complainant's Motion, Exhibit "C", No. 10.

Despite the numerous Ironhustler personnel engaged in illegal open dumping, Ironhustler "management" now claims total ignorance of the company's repeat violations. The penalties of \$10,000 on July 25, 2013 in PCB 2012-021, and of \$3,000 on February 28, 2019 in AC 2019-017 clearly did not make an impression on Ironhustler. "The Board will assess a penalty which will dissuade [Respondent] from such future business decisions which result in violations." *People v. Watts*, PCB 94-127 (May 4, 1995), slip op. at 14-15. The \$80,000 penalty requested in Complainant's Motion is an appropriate penalty in light of Ironhustler's conduct, its past violations, and its unresponsiveness to past penalty assessments by the Board. It is not excessive in comparison to the Board's assessment of a \$60,000 penalty in *People v. Watts*, PCB 94-127, in 1995, which was upheld by the Appellate Court.

### **CONCLUSION**

For the reasons stated above, and pursuant to Complainant's Motion for Summary Judgment filed on March 29, 2021, Complainant is entitled to the entry of judgment in its favor and against Ironhustler as stated in the Prayer to Complainant's Motion, including a penalty assessment against Ironhustler of \$80,000 and an order that Ironhustler cease and desist from future violations of the Act and Board regulations. Ironhustler's Cross-Motion for Summary Judgment should be denied.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
KWAME RAOUL  
ATTORNEY GENERAL

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

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Dated: June 3, 2021

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on June 3, 2021, the attached Notice of

Filing upon the following persons by email:

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Furthermore, I, the undersigned, certify that I have served on June 3, 2021, the attached  
Notice of Filing upon the following persons by depositing the document in a U.S. Postal Service  
mailbox by the time of 5:00 P.M., with proper postage or delivery charges prepaid:

Venovich Construction Company  
c/o Joseph L. Venovich, Jr., Registered Agent  
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BY: /s/ Raymond J. Callery  
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