BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, **by KWAME RAOUL, Attorney General** **of the State of Illinois,**	)	
Complainant,	)	
v.	)	**PCB No. 20-16** **(Enforcement - Land)**
IRONHUSTLER EXCAVATING, INC., **an Illinois corporation, and** **RIVER CITY CONSTRUCTION, LLC,** **an Illinois limited liability company.**	)	
Respondents.	)	

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 River City Construction, LLC's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, copies of which are hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS
KWAME RAOUL
ATTORNEY GENERAL

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

BY:_/ss/ Raymond J. Callery_______
RAYMOND J. CALLERY
Environmental Bureau
Assistant Attorney General

Office of the Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
raymond.callery@illinois.gov

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)**

COMPLAINANT'S REPLY TO RIVER CITY'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of Illinois, states as follows for its reply to River City Construction, LLC's ("River City") Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment filed on May 14, 2021 ("Response and Cross-Motion"):

INTRODUCTION

Several sections of River City's Response and Cross-Motion are devoted to issues that Complainant addresses in Complainant's Reply to Ironhustler Excavating, Inc.'s ("Ironhustler") Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment. Rather than repeat those arguments, Complainant here will incorporate by reference its arguments in its Reply to Ironhustler.

River City argues at Section V.B. (page 10) of the Response and Cross-Motion that River City is entitled to summary judgment in its favor because Complainant has failed to satisfy its burden to establish that Ironhustler deposited "general construction or demolition debris" or

"waste" at the Disposal Site. In response, see Complainant's Reply to Ironhustler's Response and Cross-Motion, pages 2-6. There is no genuine issue of material fact that Ironhustler deposited "general construction or demolition debris" or "waste" at the Disposal Site.

River City argues at Section V.D. (page 15) of the Response and Cross-Motion that the penalty of $35,000 requested in Complainant's Motion for Summary for Judgment filed March 29, 2021 is inappropriate. See Complainant's Reply to Ironhustler's Response and Cross-Motion, pages 8-10. Further arguments are stated below.

Complainant will also respond to River City's statements of uncontested facts set forth in Sections III (page 3) and IV (page 9) of its Response and Cross-Motion. Finally, Complainant will address River City's argument in Section V.C. that it did not "allow" violations to occur at the Disposal Site. River City's argument fails because the Board's caselaw makes clear that River City, as general contractor, had sufficient control over the open dumped waste to establish violations of the Act.

THE UNCONTESTED FACTS ESTABLISH RIVER CITY'S CONTROL OF WASTE

River City agrees that it was the general contractor for the Delavan CUSD No. 703 project and that its February 26, 2016 contract with the school district included the demolition of the existing high school building. Response and Cross-Motion at 3. River City agrees that its employees responsible for supervising the Delavan CUSD No. 703 project were Cordy Gerdes, Vice President for Project Management; Kevin Beal, Project Manager for the Delavan CUSD No. 703 project; and Jon Stegmaier, Superintendent for the project.

River City agrees that part of the agreement between River City and Delavan CUSD No. 703 was AIA A201-2007, General Conditions of the Contract for Construction, which was incorporated by reference. At page 5 of the Response and Cross-Motion, River City quotes

Section 3.3.1 of the general contract conditions:

> The Contractor [River City] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract…

River City further quotes Section 3.3.2 of the general contract conditions:

> The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

River City also agrees that, pursuant to the June 28, 2016 "Subcontract for Building Construction" between River City and Ironhustler, River City designated one or more persons who were authorized representative(s) on-site <u>and off-site</u>. Such authorized representative(s) were to be the only person(s) Ironhustler was to look to for instructions, orders, and/or directions, except in case of emergency. Under certain circumstances, the Contractor [River City] has the authority to terminate the Subcontractor. (emphasis added). Pages 5 to 6 of the Response and Cross-Motion.

Finally, River City agrees that the demolition debris open dumped at the Disposal Site 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. Page 8 of the Response and Cross-Motion.

RIVER CITY "CAUSED" OR "ALLOWED" VIOLATIONS OF THE ACT

At pages 11 to 12 of the Response and Cross-Motion, River City correctly states the applicable law. To establish River City's liability for the alleged violations, Complainant must show that River City "caused or allowed" the violations of the Act to take place. 415 ILCS 5/21 (2018); 415 ILCS 5/12 (2018).[1] Intent to cause pollution, or even knowledge of the pollution, is

[1] Complainant does not allege any violations under Section 12 of the Act, 415 ILCS 5/12 (2018).

not required to prove a violation under the relevant sections. *Phillips Petroleum Co. v. IEPA*, 72 Ill. App. 3d 217, 220 (2d Dist. 1979). Instead, what is required is a "capability to control" the pollution. *Id.* Liability is not limited to owners or operators of dumping sites, but can be applied to generators or transporters of waste as well. *People ex rel. Ryan v. McFalls*, 313 Ill. App. 3d 223, 226 (3d Dist. 2000).

The Court in *McFalls* explained:

> The Act does not define "cause." In the absence of a statutory definition, "cause" should be given its plain and ordinary meaning. See *Moran Transportation Corp. v. Stroger*, 303 Ill. App. 3d 459, 236 Ill. Dec. 922, 708 N.E.2d 508 (1999). The verb "cause" ordinarily means "to serve as cause or occasion of [or to] bring into existence * * * " (Webster's Third New International Dictionary 356 (1993)).
>
> The Act contains a broad definition of "person." The definition contains no qualifying language limiting its scope to entities having an ownership interest in, or control over, a disposal site. Moreover, neither ownership, nor control, of an allegedly illegal disposal site is necessary to affect the consolidation of refuse there. Therefore, an off-site generator, as a "person," may "cause" "open dumping" within the plain meaning of subsections 21(a) and 21(p)(1). Accordingly, we hold that off-site generators fall within the class of persons who may violate these subsections.

Id. at 226-227.

River City suggests at page 5 of its Response and Cross-Motion that Complainant is attempting to create liability under the Act based upon third-party contract clauses. This completely misunderstands both Complainant's argument and the scope of liability under the Act. The obligations River City undertook in its contracts with Delavan CUSD No. 703 and Ironhustler are evidence of River City's control over the pollution source—the school that River City agreed to demolish.

Under its contract with Ironhustler, River City had one or more representations on-site and off-site to supervise the project. Ironhustler was to follow River City's instructions concerning the project and River City could terminate Ironhustler. Under River City's contract

with Delavan CUSD No. 703, River City was responsible for the acts and omissions of subcontractors including Ironhustler. River City's failure to supervise Ironhustler does not negate the fact that it clearly had the authority and capability to do so.

Earlier Board decisions demonstrate River City's liability under these circumstances. *Environmental Protection Agency v. James McHugh Construction Co.*, PCB 71-291 (May 17, 1972), involved three construction companies that engaged in a joint venture with the City of Chicago to install a major sewer at Lawrence Avenue in Chicago. Guided by precedent and the statutory language, the Board determined that it would be proper to hold the City of Chicago liable for the dirty water dumped into the Chicago River because the City placed a settlement basin requirement in its joint-venture contract with the contractors, kept an engineer on site to enforce its contractual interests, and was "fully involved" in pollution control planning and implementation on the project. *Id.* at 4-514 to 4-515.

Further, this case is directly on point with the Board's decision in *People v. Altivity Packaging, LLC*, PCB 12-021 (July 25, 2013). That case, like this one, involved Ironhustler's open dumping of waste as a subcontractor. The Board held the general contractor liable for the open dumping of waste and stated:

> By contracting to construct a wastewater treatment plant for Altivity, Intra-Plant [the general contractor] received control over those tasks incidental to completing the project, including disposal of unusable, excavating fill material. Intra-Plant was required to properly dispose of the waste. Therefore, the Board finds Intra-Plant exercised sufficient control of the waste to support a finding that it caused or allowed open dumping of waste.

Id., slip op. at 7.

THE CIVIL PENALTY SOUGHT BY COMPLAINANT IS APPROPRIATE

In *People v. Altivity Packaging, LLC*, PCB 12-021 (July 25, 2013), the Board assessed the same penalty against Intra-Plant Maintenance Corporation, the general contractor of a soil

removal project, as it did against the company that actually illegally disposed of the soil, its subcontractor, Ironhustler. "The deterrence of further violations is recognized by the courts as a critical factor in assessing the appropriate penalty upon respondents." *Id*., slip op. at 11. As the Board held in *Altivity*:

> [t]he assessment of penalties against recalcitrant defendants who have not sought to comply with the Act voluntarily but who have by their activities forced the Agency or private citizens to bring action against them may cause other violators to act promptly and not wait for the prodding of the Agency.

Id., slip op. at 11-12 (citing *Lloyd A. Fry Roofing Co. v. PCB*, 46 Ill. App. 3d 412, 367 N.E. 2d 23, 28-29 (5th Dist. 1977)). Further, the Board held in *Altivity*:

> The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts." The basis for calculating the maximum penalty is contained in Sections 42(a) and (b) of the Act. 415 ILCS 5/42(a) and (b) (2010).

Id., slip op. at 12 (citations omitted).

Complainant's Motion asserts there is no genuine issue of material fact as to the six violations alleged in the Complaint. Even accepting Ironhustler's argument that the general construction or demolition debris was cleaned up ten days after it was open dumped at the Disposal Site (Ironhustler's Cross-Motion and Response at pages 1-2), the maximum penalty to be assessed against River City would be at least $840,000. Complainant is asking the Board to assess a penalty of $35,000 to as River City, which is 4% of the maximum.

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 River City as stated in the Prayer to Complainant's Motion, including a penalty assessment against River City of $35,000 and an order that River City cease and desist from future

violations of the Act and Board regulations. River City'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

BY: _/ss/ Raymond J. Callery______
RAYMOND J. CALLERY
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
raymond.callery@illinois.gov

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:

Jay H. Scholl
DAVIS & CAMPBELL L.L.C.
401 Main Street, Suite 1600
Peoria, IL 61602
jhscholl@dcamplaw.com
Attorney for Ironhustler Excavating Inc.

Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
Carol.Webb@illinois.gov
Hearing Officer

Kenneth Eathington
Quinn, Johnston, Henderson
Pretorius & Cerulo
227 N.E. Jefferson Street
Peoria, IL 61602
keathington@quinnjohnston.com
Attorney for River City Construction, LLC

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
207 South Sampson Street
P.O. Box 410
Tremont, IL 61568

BY:_/ss/ Raymond J. Callery_______
RAYMOND J. CALLERY
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
raymond.callery@illinois.gov