

ILLINOIS POLLUTION CONTROL BOARD
October 7, 2021

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 2020-16
) (Enforcement - Land)
IRONHUSTLER EXCAVATING, INC., an)
Illinois corporation, and RIVER CITY)
CONSTRUCTION, LLC, an Illinois limited)
liability company,)
)
Respondents.)

OPINION AND ORDER OF THE BOARD (by B.F. Currie)

On September 16, 2019, the Office of the Illinois Attorney General, on behalf of the People of the State of Illinois (People), filed a seven-count complaint against Ironhustler Excavating, Inc. (Ironhustler), River City Construction, LLC (River City) (respondents), and Venovich Construction Co. (Venovich). The complaint concerned the alleged improper disposal of demolition debris at a site located at 9701 King Road and along the Mackinaw River in Hopedale Township, Tazewell County (Mackinaw River site). On October 25, 2019, the Board accepted the complaint for hearing. On November 7, 2019, the Board issued an order accepting a stipulation and proposed settlement between the People and Venovich Construction. The People's case continued against Ironhustler and River City.

On March 29, 2021, the People filed a motion for summary judgment, after which Ironhustler filed a cross-motion for summary judgment. The three parties assert that there are no genuine issues of material fact necessitating a hearing. The Board agrees and finds that the record supports a finding for the People.

This opinion and order grants the People's motion for summary judgment concerning the waste disposal violations, denies Ironhustler's cross-motion for summary judgment, and imposes an \$80,000 penalty against Ironhustler and a \$35,000 penalty against River City. The opinion first provides this case's procedural history. The Board then sets forth the uncontested facts of the case. Next, the Board provides the relevant legal background and the standards for considering motions for summary judgment. That is followed by the Board's analysis and order granting the People's motion for summary judgment and ordering Ironhustler and River City to pay civil penalties.

PROCEDURAL HISTORY

On September 16, 2019, the People filed a complaint against Ironhustler, River City, and Venovich (Comp.). On the same day, the People and Venovich filed a stipulation and proposal

for settlement and a motion for relief from the hearing requirement. On September 19, 2019, the Board accepted the complaint and directed the Board's Clerk to file notice of the proposed settlement. The notice was published on September 25, 2019 in the *Delavan Times*. The Board did not receive any requests for hearing. On November 7, 2019, the Board accepted the Venovich Settlement. Under the settlement, Venovich agreed to pay a civil penalty of \$2,500 and did not affirmatively admit the violations.

On November 20, 2019, Ironhustler filed an answer to the complaint (Ironhustler Answer). River City filed an answer to the complaint on November 21, 2019 (River City Answer).

On March 29, 2021, the People filed a motion for summary judgment (People SJ) against Ironhustler and River City, with supporting affidavits and exhibits. Seven exhibits are attached to the People's motion for summary judgment:

Affidavit of Illinois Environmental Protection Agency (IEPA) inspector Jason Thorp, dated March 23, 2021, including "Attachment 1" which is comprised of inspection photos (Exh. A, or Thorp Affidavit);

Answer to People's First Set of Interrogatories by River City, dated January 3, 2020. (Exh. B);

Answer to Complainant's First Set of Interrogatories by Ironhustler, dated January 7, 2020. (Exh. C);

February 26, 2016 Contract between Delavan CUSD No. 703 and River City. (Exh. D);

The June 28, 2016 "Subcontract for Building Construction" between River City and Ironhustler. (Exh. E);

Kennel Trucking Hourly Time Sheets for July 7, 2017 produced by Ironhustler on January 7, 2020 as "IHX 000044-000046." (Exh. F);

Cover letter submitted with landfill tickets produced by Ironhustler on January 7, 2020 as "IHX 000317." (Exh. G).

On May 12, 2021, Ironhustler filed a joint response to the People's motion for summary judgment and a cross-motion for summary judgment (Ironhustler SJ). On May 14, 2021, River City filed a joint response to the People's motion for summary judgment and Ironhustler's cross-motion for summary judgment (River City Resp.). On June 3, 2021, the People filed both a response to Ironhustler's cross-motion for summary judgment (People's Resp.) and, separately, a reply to River City's response (People's Reply).

UNCONTESTED FACTS

On February 26, 2016, the Delavan Community Unit School District No. 703 hired River City as a general contractor to build a new high school wing of the Delavan Junior-Senior High School. People SJ at 5-6, Exhibit A, Exh B at ¶9, Exh. C at ¶9. The contract to build the new wing also included the demolition, removal, and disposal of a portion of the existing building at the site. People SJ at 3-4 and Exhibit D at 1. River City is an Illinois limited liability company and Ironhustler is an Illinois corporation. People SJ at 5, Exh. B at ¶6, Exh. C at ¶5.

On June 28, 2016, River City entered into a subcontract with Ironhustler to work on the demolition, removal, and disposal work for the Delavan School construction project. Exhibit B at ¶7, 12, Exh. D at 4-5, Exhibit C at ¶12.

Rather than transport all of the demolition debris from the high school to permitted landfills, Ironhustler deposited some of the demolition debris at the Mackinaw River site, abutting the river. People SJ at 8, Exh. C at ¶7, Ironhustler Ans. at 14. Venovich Construction owned the Mackinaw River site at King Road. Comp. at 2; Ironhustler SJ at 7, ¶13; River City Resp., Exh. 1 ¶19; Exh. F Inspection Report at 1, 2. Joseph Venovich, President of Venovich Construction, had requested concrete from Ironhustler for the Mackinaw River site. People SJ at Exh. C 1-2, ¶2; Exh. C at 4, ¶11. Venovich was attempting to address stream bank erosion along the Mackinaw River site. Comp. at 3, People SJ at Exh. C 4, ¶11; Ironhustler SJ at 7 ¶13. Ironhustler retained Robert E. Kennel Trucking, Inc. (Kennel Trucking) to assist in hauling debris from the Delavan high school site. People SJ at 7, Exh. C. at ¶8.

On July 7, 2017, hourly time sheets from Kennel Trucking show 24 truckloads of material from the Delavan School Site were sent to the Mackinaw River site. People SJ at 8, Exh. C at ¶7. On July 13, 2017, IEPA inspected the Mackinaw River site and found approximately 750 cubic yards of demolition debris deposited along the bank of the Mackinaw River. People SJ at 9, Thorp Affidavit at 1-2. The debris 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. Thorp Affidavit at 2. Additionally, a John Deere 650H dozer with Ironhustler markings was observed at the Mackinaw River site. *Id.* Some of the debris was located in water along the edge of the river. *Id.* After inspecting the Mackinaw River site, IEPA inspected the Delavan School Site. *Id.*

Neither Ironhustler nor River City applied for a permit, or were granted one, from the IEPA to operate a landfill at the Mackinaw River site. People SJ at 8, Exh. C at 5.

The contract between Delavan CUSD No. 703 and River City gave River City the sole authority and responsibility to control and supervise the contracted work. Exhibit D, Article 3. “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, unless the Contract Documents give other specific instructions concerning these matters.” *Id.* at §3.3.1. Additionally, that contract made River City responsible for the acts and omissions of its subcontractors. “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.” Id. at §3.3.2. The contract between River City and Ironhustler stated that River City’s employees were responsible for supervising the subcontractors and their work at Delavan School project. Exhibit B at ¶10, Exh. E. “The Subcontractor shall perform such work... under the general direction of the Contractor and in accordance with this Agreement and the Contract Documents.” Exh. E at §2.1. The contract between River City and Ironhustler designated one or more River City representatives as the only persons Ironhustler was to look to for instructions, orders, and/or directions, except in case of emergency. “The Contractor shall designate one or more persons who shall be the Contractor’s authorized representative(s) a) on-site and b) off-site. Such authorized representative(s) shall be the only person(s) the Subcontractor shall look to for instructions, orders, and/or directions, except in an emergency.” Exhibit E at § 7.2.

By July 17, 2017, Ironhustler had removed the demolition debris from the Mackinaw River site and deposited it at Indian Creek Landfill. People SJ at 7, Ironhustler Answer at ¶20. The IEPA inspector reported that at the November 16, 2017, reinspection of the site, the site was restored to compliance. SJ at 15, Thorp Affidavit at 2. Inspector Thorp reported, “the open dumped demolition debris had been removed.” Thorp Affidavit at 2. Copies of disposal receipts were submitted to IEPA showing the disposal of 567.32 tons of demolition debris from the Mackinaw River site to the Indian Creek Landfill in Tazewell County. People SJ at 15, Ironhustler Answer at ¶20.

Summary of People’s Complaint

The seven counts of the complaint are charged against all three of the respondents. Count I of the complaint alleged that the respondents violated Section 21(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(a) (2020)) by causing or allowing the open dumping of waste. Count II alleged respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2020)) by causing or allowing the open dumping of waste in such a manner that resulted in litter at the disposal site. Count III alleged the respondents violated Section 21(p)(4) of the Act (415 ILCS 5/21(p)(4) (2020)), by causing or allowing the open dumping of waste in standing or flowing water. Count IV alleged the respondents violated Section 21(p)(7)(i) of the Act (415 ILCS 5/21(p)(7)(i) (2020)), by causing or allowing the open dumping of general construction or demolition debris. Count V of the complaint alleged the respondents violated Section 810.103 of the Board’s solid waste disposal regulations, 35 Ill. Adm. Code 810.103, by developing and operating a landfill without a permit, and therefore violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2020)). Count VI of the complaint alleged the respondents violated Section 812.101(a) of the Board’s solid waste disposal regulations, 35 Ill. Adm. Code 812.101(a), by failing to submit an application for permit to develop and operate a landfill and thereby conducted a waste-disposal operation without a permit, violating Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2020)). Count VII of the complaint alleged respondents violated Section 21(e) of the Act (415 ILCS 5/21(e) (2020)), by disposing waste at an improper site.

As to each of the respondents, the People’s requested remedy is a finding of violations, to cease and desist from future violations of the Act and associated regulations, ordering

respondents to remove miscellaneous fill material from the disposal site, and imposition of a civil penalty.

LEGAL BACKGROUND

The Act defines six terms that are central to this case:

“General construction or demolition debris” means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed or other asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and corrugated cardboard, piping or metals incidental to any of those materials. 415 ILCS 5/3.160(a) (2020).

“Disposal” means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 415 ILCS 5/3.185 (2020).

“Open dumping” means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. 415 ILCS 5/3.305 (2020).

“Refuse” means waste. 415 ILCS 5/3.385 (2020).

“Sanitary landfill” means a facility permitted by the Agency for the disposal of waste on land. . . 415 ILCS 5/3.445 (2020).

“Waste” means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . 415 ILCS 5/3.535 (2020).

The Litter Control Act defines “Litter” as follows:

“Litter” means any discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, cigarettes, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle (as defined in the Illinois Vehicle Code), motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste as defined in Section 3.360 of

the Environmental Protection Act, or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2020).

Sections 21(a), (d), (e), (p)(1), (p)(4) and (p)(7)(i) of the Act (415 ILCS 5/21(a), (d), (e), (p)(1), (p)(4), and (p)(7)(i) (2020)) require that no person shall:

(a) Cause or allow the open dumping of any waste.

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit. . .
2. In violation of any regulations or standards adopted by the Board under this Act. . .

(e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

(p) In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(1) litter;

(4) deposition of waste in standing or flowing waters;

(7) deposition of:

- (i) general construction or demolition debris as defined in Section 3.160(a) of this Act...

Section 812.101(a) of the Board's solid waste disposal Regulations, 35 Ill. Adm. Code 812.101(a), provides as follows:

- (a) All persons, except those specifically exempted by Section 21(d) of the Environmental Protection Act (Act) ... shall submit to the Agency an application for a permit to develop and operate a landfill...

ALLEGED VIOLATIONS

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. 35 Ill. Adm. Code 101.516(b); Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

Causing or Allowing the Open Dumping of Waste (Section 21(a))

Section 21(a) of the Act forbids any person from causing or allowing the open dumping of any waste. 415 ILCS 5/21(a) (2020). “Open dumping” is defined to include the consolidation of refuse or waste, at a facility which does not meet the requirements of the Act. 415 ILCS 5/3.305 (2020). “Sanitary landfill” means a facility permitted by the Agency for the disposal of waste on land. . . 415 ILCS 5/3.445 (2020). Venovich’s property abutting the Mackinaw River does not meet the requirements of the Act because it does not have the requisite permit for waste disposal. People’s SJ at 15.

Under the Act, “‘waste’ means any garbage... or other discarded material...” 415 ILCS 5/3.535 (2020). The material disposed of at the Mackinaw River 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. Thorp Affidavit at 2. Once the Delavan High School building was demolished and the components comingled and removed, the material became “discarded material,” thereby falling within the definition of “waste” under the Act. *See* 415 ILCS 5/5.35 (2020).

It has been established that “knowledge or intent is not an element to be proved for a violation of the Act. This interpretation of the Act ... is the established rule in Illinois.” People v. Fiorini, 143 Ill. 2d 318, 336 (1991); *see also* Freeman Coal Mining Corp. v. PCB, 621 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974) (the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to find liability).

Furthermore, “[t]he analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.” People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793 (1993) (*quoting* People v. Fiorini, 143 Ill. 2d at 346 (internal citations omitted)). Additionally,

“[t]he 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. Neither ownership, nor control, of an allegedly illegal disposal site is necessary to effect the consolidation of refuse. Therefore, an off-site generator, such as River City or Ironhustler, “may cause open dumping within the plain meaning of subsections 21(a)” of the Act. People ex rel. Ryan v. McFalls, 728 N.E.2d 1152, 1155 (3rd Dist. 2000) (internal citations omitted).

River City claims that as a general contractor, it lacked control over the disposal of the demolition debris and is not liable for the violations listed in the Complaint. River City Resp. at 13. River City relies on Phillips Petroleum Co. v. Illinois Env't Prot. Agency, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (1979) to support its contention. River City's reliance is misplaced.

The law is well settled that “[t]he Act is *malum prohibitum*; for a violation to be found, it is not necessary to prove guilty knowledge or *mens rea*. . . . Meadowlark Farms, Inc. v. Illinois Pollution Control Board (1974), 17 Ill.App.3d 851, 308 N.E.2d 829.” People v. A.J. Davinroy Contractors, 249 Ill.App.3d 788, 793 (1993). To be liable under the Act for causing or allowing pollution, an alleged violator must have “sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution.” Phillips Petroleum Co. v. Illinois Env't Prot. Agency, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (1979). The People must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred. Davinroy, 249 Ill.App.3d at 793. Lack of knowledge or intent is not a defense to violations of this Section of the Act. *Id.* Previous Board cases also supported the position that general contractors have an “affirmative duty on persons in a position of potential control to take action to prevent pollution.” IEPA v. James McHugh Construction Co., PCB 71-291 (May 17, 1972). Thus, the Board need not find that River City had knowledge of the alleged violation. Rather, the Board must find that River City merely had the capability to control the pollution.

Further, the Board has held in a prior case involving a general contractor and Ironhustler as a subcontractor, that the general contractor “exercised sufficient control over the waste to support a finding that it caused or allowed the open dumping of waste.” People v. Intra-Plant Maintenance Corp., Ironhustler Excavating, Inc., and Ron Bright, PCB 12-21, slip op. at 7-8 (July 25, 2013).

The facts support River City's control over the open dumping of demolition debris. While River City did not directly dispose of materials from the site, River City agreed to supervise the work as indicated by the plain language of the contract between River City and Ironhustler, in addition to the plain language of the contract between River City and Delavan CUSD No. 703. By contracting to demolish the Delavan High School, River City received control over those tasks incidental to completing the project, including the disposal of demolished material. River City was required to properly dispose of the waste. Therefore, the Board finds River City exercised sufficient control over the waste to support a finding that it caused or allowed the open dumping of waste.

In its answer to the People's complaint, Ironhustler admits that River City subcontracted the demolition, removal and disposal of the material from the Delavan high school to Ironhustler. Ironhustler Answer at ¶10. Additionally, Ironhustler admits that Kennel Trucking was retained by Ironhustler to haul debris from the Delavan CUSD No. 73 project site. Ironhustler SJ at 6. Finally, Ironhustler admits that 24 loads of debris from the Delavan high school were deposited at the Mackinaw River site. Exh. C at ¶7

These uncontested facts prove that the River City and Ironhustler violated Section 21(a) of the Act (415 ILCS 5/21(a) (2020)). The Board finds that there are no genuine issues of material fact, and that the People are entitled to judgment as a matter of law. The Board therefore grants the People's motion for summary judgment, denies Ironhustler's cross-motion for summary judgment, and finds that River City and Ironhustler violated Section 21(a) of the Act.

Open Dumping Resulting in Litter, Waste in Standing or Flowing Water, and of Demolition Debris (Sections 21(p)(1), (p)(4) and (p)(7)(i))

Sections 21(p)(1), (4), (7)(i) of the Act (415 ILCS 5/21(p)(1), (4), (7)(i) (2020)) prohibit causing or allowing the open dumping of any waste in a manner which results in litter, depositing waste in standing or flowing waters, and depositing general construction or demolition debris. Litter is defined as "any discarded, used, or unconsumed substance or waste." 415 ILCS 105/3(a) (2020). The Board finds that the uncontested facts show that the material deposited at the Mackinaw River site was litter and therefore the respondents violated Section 21(p)(1) of the Act.

IEPA inspector Jason Thorp says in his affidavit that "[s]ome of the demolition debris was located in the water along the edge of the river." Thorp Affidavit at 1-2. Additionally, inspection photographs show debris located in the Mackinaw River. People's SJ Exhibit A, attachment 1. The Board finds that the uncontested facts show that the respondents deposited waste in standing or flowing waters and therefore the respondents violated Section 21(p)(4) of the Act.

The Act defines general construction or demolition debris as material as certain non-hazardous products including wood, electrical wiring, piping, glass, and metal such as rebar. 415 ILCS 5/3.160(b) (2020). It is uncontested that the IEPA inspection photographs from the July 13, 2017, inspection of the Mackinaw River site show the presence of such material at the Mackinaw River site. *Id.* 4-5. Based on this evidence and applying the definitions provided by the Act, the Board finds that the material found during the IEPA inspection was general construction and demolition debris. *Id.* The Board finds that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law. The Board therefore grants the People's motion for summary judgment, denies Ironhustler's cross-motion for summary judgment, and finds that River City and Ironhustler violated Section 21(p)(7)(i) of the Act.

Developing and Operating a Landfill Without a Permit and in Violation of Board Regulations (Sections 21(d)(1) and (d)(2))

Section 21(d)(1) and (d)(2) of the Act, 415 ILCS 5/21(d)(1), (d)(2) (2020), prohibit conducting any waste-storage, waste-treatment, or waste-disposal operation “(1) [w]ithout a permit granted by the Agency or in violation of any conditions imposed by such permit... or (2) [i]n violation of any regulations or standards adopted by the Board under this Act...” Additionally, Section 812.101(a) of the Board’s solid waste disposal regulations, 35 Ill. Adm. Code 812.101(a), provides that “[a]ll persons, except those specifically exempted by Section 21(d) of the Act, shall submit to the Agency an application for a permit to develop and operate a landfill.” A landfill is defined by the Board’s solid waste disposal regulations as, “a unit or part of a facility in or on which waste is placed and accumulated over time for disposal...” 35 Ill. Adm. Code 810.103.

Ironhustler and River City have never applied for nor were granted a permit from IEPA to develop or operate a landfill at the Mackinaw River site. People SJ at 15, Ironhustler Answer at ¶ 21. Based on this evidence and applying the definitions provided by the Act and Board regulations, the Board finds that respondents developed and operated a landfill at the Mackinaw River site without a permit granted by IEPA. The Board finds that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law. The Board therefore grants the People’s motion for summary judgment, denies Ironhustler’s cross-motion for summary judgment, and finds that by depositing waste at the unpermitted Mackinaw River site, River City and Ironhustler violated Section 812.101(a) of the Board’s regulations, and thereby violated Section 21(d)(2) of the Act.

Waste Disposal at an Improper Site (Section 21(e))

Section 21(e) of the Act (415 ILCS 5/21(e) (2020)) prohibits waste disposal anywhere except at a site or facility meeting the requirements of the Act. As set forth in the People’s motion, “[n]either Ironhustler nor River City applied for or were granted a permit from IEPA to develop and operate a landfill at the Venovich site.” People’s SJ at 15. The Board finds that by possessing sufficient control over materials that were disposed of at the unpermitted Mackinaw River site, River City violated Section 21(e) of the Act. See Intra-Plant, PCB 12-21, slip op. at 7-8. The Board finds that by transporting the material and discarding it at the unpermitted Mackinaw River site, Ironhustler violated Section 21(e) of the Act. *Id.* The Board finds that the uncontested facts show that the respondents violated Section 21(e) of the Act.

The Board finds that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law. The Board therefore grants the People’s motion for summary judgment, denies Ironhustler’s cross-motion for summary judgment, and finds that River City and Ironhustler violated Section 21(e) of the Act.

REMEDY

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2020). People v. Gilmer, PCB

99-27, slip op. at 6 (Aug. 24, 2000), *citing* 415 ILCS 5/33(c) and 42(h) (2010). The Board must consider factors listed in Section 33(c) of the Act in arriving at a remedy, including whether to impose a civil penalty. *See Toyal America, Inc. v. PCB*, 2012 IL App. 3d 100585, ¶45 (Section 33(c) factors taken into account in determining whether or not to impose penalty); *see also Matteson WHP Partnership v. Martin’s of Matteson*, PCB 97-121, slip op. at 14, 18 (June 22, 2000) (Section 33(c) factors taken into account for remedy, including requests to cease and desist and remediate). The Board is authorized to consider the factors in Section 42(h) of the Act in determining an appropriate civil penalty amount. *Toyal America* at ¶47. In addition, the Board must bear in mind that no formula exists for deciding upon a penalty amount, and all facts and circumstances must be reviewed. *Gilmer*, PCB 99-27, slip. op. at 8. The Board discusses each of the Section 33(c) and 42(h) factors below for both River City and Ironhustler.

Section 33(c) Factors

When the Board makes its orders and determinations, Section 33(c) of the Act requires that the Board consider “all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved,” including these five factors:

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

- (i) the character and degree of injury to, or interference with the protection of 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 emissions, discharges, or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2020).

The Board finds that respondents’ improper disposal of waste at the Mackinaw River endangered the health, general welfare, and physical property of the people of Illinois and finds this factor weights against respondents. The Board finds that while the construction of a new school has social and economic value, the creation of an open dump has no social and economic value and determines that this factor weighs against respondents.

The Mackinaw River site was operating as an unpermitted landfill by failing to meet the requirements of the Act and regulations, therefore making it an inappropriate place for disposal activities. The Board weighs this factor against respondents. Proper disposal of general

construction and demolition debris is practicable and reasonable. The Board weighs this factor against respondents. The Board finds that after the IEPA inspection, Ironhustler removed the debris from the Mackinaw River site to a permitted landfill. The Board weighs this factor in favor of respondents.

Taking these factors into account, the Board finds that the People's requested relief of ceasing and desisting from future violations of the Act is appropriate along with a civil penalty. Therefore, the Board proceeds to discuss the Section 42(h) factors in determining the appropriate civil penalty. The People's motion requests that the Board order the respondents to "remove the miscellaneous fill material from the disposal site and dispose of it in compliance with the Act." The Board finds the record lacks any documentation that the Mackinaw River site remains contaminated with waste. In fact, at multiple points in the People's motion for summary judgment and attached exhibits, the People say the site was brought into compliance as of the reinspection on November 16, 2017. Therefore, the Board declines to order the respondents to perform any additional work at the Mackinaw River site.

Section 42(h) Factors

When the Board determines the appropriate penalty to be imposed, Section 42(h) of the Act authorizes the Board to consider "any matters of record in mitigation or aggravation of penalty," including these eight factors:

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

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (5) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;

- (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. 415 ILCS 5/42(h) (2020).

Based on the facts of this matter and these statutory factors, the People argue that assessing civil penalties of \$80,000 against Ironhustler and \$35,000 against River City “will serve to further deter violations and aid in future voluntary compliance with the Act and Board regulations.” People SJ at 22.

Following the IEPA inspection on July 13, 2017, Ironhustler and River City promptly brought the Mackinaw River site into compliance. Load receipts show that the material was removed by July 17, 2017, and upon reinspection on November 16, 2017, IEPA determined the debris at the site had been removed. The Board finds that the duration of the violations weighs in favor of the respondents, but the gravity of the violations aggravates the assessment of penalty. Further, the Board finds that diligent compliance with the requirements of the Act after the initial IEPA inspection weighs in favor of the respondents. As to economic benefit, the Board finds that respondents excavated waste from the Mackinaw River site and paid for disposal at a landfill. The People’s motion did not quantify respondents’ economic benefit due to noncompliance. The Board finds that the 42(h)(3) factor does not aggravate or mitigate the penalty amount.

The deterrence of further violations is recognized by the courts as a critical factor in assessing the appropriate penalty upon the respondents. As stated in Lloyd A. Fry Roofing Company v. PCB, 46 Ill. App. 3d 412, 361 N.E. 2d 23, 28-29 (5th Dist. 1977), “[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.” The Board finds that a \$80,000 penalty against Ironhustler and a \$35,000 penalty against River City will serve to deter future violations of the Act by respondents and other similarly situated persons.

The People’s motion lists four previously adjudicated violations by Ironhustler, a factor that the Board finds aggravates the assessment of a penalty as to Ironhustler. People’s SJ at 22. First, the Board ordered Ironhustler to pay a penalty of \$10,000 on July 25, 2013, in Intra-Plant Maintenance, PCB 12-21, slip op. at 13 (July 25, 2013). In that case, the Board found Ironhustler caused or allowed the open dumping of waste in violation of Section 21(a) of the Act and disposed of waste at a site that did not meet the requirements of the Act in violation of Section 21(e). *Id.* at 12-13. Second, the Board ordered Ironhustler to pay a penalty of \$3,000 on February 28, 2019 in IEPA v. Harold Poignant Jr., River Valley Pipe LLC, and Ironhustler

Excavating, Inc., AC 19-17, slip op. at 2 (Feb. 28, 2019). In that case, the Board found that Ironhustler caused or allowed the open dumping of waste resulting in litter in violation of Section 21(p)(1) of the Act and caused or allowed the open dumping of waste in a manner resulting in the deposition of general construction or demolition debris in violation of Section 21(p)(7) of the Act. *Id.* at 2.

The People's motion does not indicate any prior adjudicated violations by River City, and the People indicate they are unaware of any previous violations. As a result, this factor mitigates the penalty as to River City. The record contains no evidence that either respondent agreed to perform a supplemental environmental project or successfully completed a compliance commitment agreement. Neither Ironhustler nor River City self-disclosed the violations and the Board finds that this factor aggravates the assessment of a penalty.

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts." Gilmer, PCB 99-27, slip. op. at 8, citing IEPA v. Allen Barry, PCB 88-71, slip op. at 72 (May 10, 1990). The basis for calculating the maximum penalty here is contained in Sections 42(a) of the Act, which provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act or Board regulation, as well as an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. 415 ILCS 5/42(a) (2020). Because the eight violations existed at the Mackinaw River site from July 7, 2017 to July 17, 2017, the statutory maximum civil penalty against each respondent is \$500,000. The People have asked for a civil penalty of \$80,000 from Ironhustler due to aggravating factors and a lesser penalty of \$35,000 from River City.

While the People's motion did not quantify respondent's economic benefit due to noncompliance, the Board finds that imposition of the \$80,000 on Ironhustler and \$35,000 on River City, as requested by the People, is appropriate. Therefore, based on the record, the Board assesses a civil penalty of \$80,000 on Ironhustler and \$35,000 on River City, and orders payment within 30 days.

CONCLUSION

The Board finds that there is no genuine issue of material fact, and that the People are entitled to judgment as a matter of law. The Board grants the People's motion for summary judgment against Ironhustler and River City and denies Ironhustler's cross-motion for summary judgment. The Board therefore finds that the respondents each violated Sections 21(a), (d)(1), (d)(2), (e), (p)(1), (p)(4), and (p)(7)(i), of the Act, and Section 812.101(a) of the Board's solid waste disposal regulations. After consideration of the Section 33(c) and 42(h) factors, the Board enters a cease and desist order, and assesses a civil penalty of \$80,000 against Ironhustler and \$35,000 against River City.

This opinion constitutes the Board's finding of fact and conclusion of law.

ORDER

1. The Board grants the People's motion for summary judgment and denies Ironhustler's cross-motion for summary judgment. Accordingly, the Board finds that Ironhustler and River City violated Sections 21(a), (d)(1), (d)(2), (e), (p)(1), (p)(4), and (p)(7)(i), of the Act, and Section 812.101(a) of the Board's solid waste disposal regulations.
2. Ironhustler must pay a civil penalty of \$80,000 no later than November 8, 2021, which is the first business day after 30 days from the date of this order. Payment must be made by certified check or money order payable to the Environmental Protection Trust Fund. The case number, case name, and Ironhustler's federal employer identification number must be included on the certified check or money order.
3. River City must pay a civil penalty of \$35,000 no later than November 8, 2021, which is the first business day after 30 days from the date of this order. Payment must be made by certified check or money order payable to the Environmental Protection Trust Fund. The case number, case name, and River City's federal employer identification number must be included on the certified check or money order.
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2020)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2020)).
5. Respondents must cease and desist from further violations of the Act.

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) (2020); *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: Raymond J. Callery, AAG 500 South Second Street Springfield IL, 62706 Raymond.Callery@Illinois.gov	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Ironhustler Excavating, Inc Attn: Jay H. Scholl of Davis & Campbell L.L.C. 401 Main Street, Suite 1600 Peoria, IL 61602 jhscholl@dcamplaw.com	
River City Construction, LLC Attn: Kenneth Eathington, Jeffery A. Ryva, Matthew A. Warner of Quinn Johnston 227 NE Jefferson Street Peoria IL, 61602 keathington@quinnjohnston.com jryva@quinnjohnston.com mwarner@quinnjohnston.com	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 7, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board