

2010, the Board accepted the complaint for hearing. On April 26, 2010, Timothy James was absent from a telephonic status conference. Hearing Officer Order 4/26/2010. At that time, the People agreed to suspend the deadline for answering the complaint until further notice. During a November 2, 2010 telephonic status conference, which neither respondent attended, the People subsequently asked for the deadline for the answer to be reinstated. The deadline for the respondents' answer was set for January 15, 2011, and the Hearing Officer Order reinstating this deadline was served on both respondents. Neither respondent filed an answer to the complaint or raised an affirmative defenses.

On February 10, 2011, the People filed a motion for summary judgment (Mot.). Neither respondent filed a response to the complainant's motion for summary judgment.

THE PEOPLE'S COMPLAINT

In the one-count complaint, the People allege that Byrom Ward, a licensed electrician d/b/a Ward Electric, gave six old electrical transformers containing dielectric oil to Timothy James, who resided at 202 Fackney Street, Carmi, White County (James residence). Compl. at 2 (¶5). According to the complaint, the respondents violated Sections 21(a), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(e), 21(p)(1) (2010)). *Id.* at 3-4 (¶¶14-20). Specifically, the complaint first alleges that the respondents violated Section 21(a) of the Act (415 ILCS 5/21(a) (2010)) by "caus[ing] or allow[ing] the open dumping of refuse and waste at the James residence." *Id.* at 3-4 (¶¶14 and 18). The complaint next alleges that the respondents violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) "by disposing or abandoning wastes at a site that does not meet the requirements of the Act." *Id.* at 4 (¶20). The complaint finally alleges that the respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2010)) by "causing or allowing the open dumping of refuse and waste in a manner that resulted in litter." *Id.* The People's complaint requested the Board to order the respondents to cease and desist from any further violations and pay civil penalties. *Id.* at 5.

RESPONDENTS' ANSWERS TO THE COMPLAINT

Both Byrom Ward and Timothy James failed to file an answer to the People's complaint. The People have not filed a separate "motion to deem facts admitted" of the type the Board often sees. *See, e.g. People of the State of Illinois v. Steve Soderberg d/b/a Steve's Concrete and Excavating*, PCB 08-87 (Mar. 5, 2009). However, pursuant to the Board's procedural rules, "the respondent may file an answer within 60 days after the receipt of the complaint if the respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed." 35 Ill. Adm. Code 103.204(d). Respondents had ample notice of the consequences of their failure to respond without the filing of a separate motion to deem facts admitted. *People v. Moline Place Development, LLC, and Crosstowne Place Development, LLC.*, PCB 07-53, slip op. at 11, (June 4, 2009). Therefore, by not filing a response to the People's complaint, the Board finds that Byrom Ward and Timothy James have waived any objection to the material allegations contained in the complaint, and the facts are deemed admitted.

FACTS

On or before December 20, 2007, Timothy James transported six electrical transformers, given to him by Byrom Ward, to the James residence, located at 202 Fackney Street in Carmi, White County. Compl. at 2 (P 3,6). Timothy James then spilled approximately sixty gallons of Polychlorinated biphenyl-laden oil onto the ground of his residence. *Id.* (P7). Polychlorinated biphenyls (PCBs) are organic pollutants that are known to cause neurobehavioral and immunological changes in children, skin conditions in adults, and cancer in animals. *Id.* (P9).

During a January 3, 2008 inspection, the Illinois Environmental Protection Agency (Agency) visited the James residence in White County. Compl. at 2 (P9). During the inspection, the Agency noted that three transformers were sitting on a truck trailer and three more transformers were in the backyard of the James residence. *Id.* The Agency collected oil samples from the transformers at the James residence, and the results indicated that five of the transformers contained oil with PCB concentrations ranging from 260 ug/kg² to 5,600,000 ug/kg. *Id.* at 3 (P10). The Agency also collected soil samples that revealed that the soil in the backyard of the James residence and the pickup truck were contaminated by PCBs. *Id.*

Between February 22, 2008, and February 26, 2008, Environmental Technologies, Inc. remediated the PCB contamination at the James residence at the request of Byrom Ward. Compl. at 3 (P11). During an April 23, 2008 Agency inspection, the Agency stated that the remedial action at the James residence was completed, and fifty-six 55-gallon drums of PCB-contaminated soil were left at the James residence. *Id.* (P12). The Agency re-inspected the James residence on August 8, 2008. *Id.* (P13). During this inspection, the fifty-six 55-gallon drums of PCB-contaminated waste were no longer at the site and had been transported to a TCI PCB disposal facility in Alabama. *Id.* (P13).

STATUTORY AND REGULATORY PROVISIONS

Section 3.185 of the Act provides as follows:

“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 (2010).

Section 3.305 of the Act provides as follows:

“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 (2010).

Section 3.315 of the Act provides as follows:

² 1 ug/kg is one microgram of PCB per one kilogram of soil.

“Person” is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns. 415 ILCS 5/3.315 (2010).

Section 3.385 of the Act provides as follows:

“Refuse” means waste. 415 ILCS 5/3.385 (2010).

Section 3.535 of the Act provides, as follows:

“Waste” means any gabarge . . . 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 (2010)

Section 3.540 of the Act provides as follows:

“Waste disposal site” is a site on which solid waste is disposed. 415 ILCS 5/3.540 (2010).

Section 3.470 of the Act provides as follows:

“Solid waste” means waste.

Section 3.445 of the Act provides, in pertinent part, as follows:

“Sanitary landfill” means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder 415 ILCS 5/3.445 (2010).

Section 3.460 of the Act provides, as follows:

“Site” means any location, place, tract of land, and facilities, including but not limited to buildings, and improvements used for purposes subject to regulation or control by this Act or regulations thereunder. 415 ILCS 5/3.460 (2010).

Section 21 of the Act provides, in pertinent part, as follows:

No person shall:

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

- (e) Dispose, treat, store or abandon any waste . . . except at a site 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. 415 ILCS 5/21 (2010).

Section 33(c) of the Act provides as follows:

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 the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2010).

Section 42(h) of the Act provides as follows:

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:

- (i) the duration and gravity of the violation;
- (ii) 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;

- (iii) 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;
- (iv) 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;
- (v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
- (vii) 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. 415 ILCS 5/42(h) (2010).

Section 3(a) of 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, debris, rubbish . . . 415 ILCS 105/3(a) (2010).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E. 2d at 370, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. -3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Both Byrom Ward and Timothy James failed to respond to the complaint, so the Board has found that all facts alleged in the complaint are deemed admitted. Thus, there are no issues of material fact, and summary judgment is appropriate.

PEOPLE’S MOTION FOR SUMMARY JUDGMENT

The People have alleged three violations of the Act against Byrom Ward and Timothy James, specifically Sections 21(a), 21(e), and 21(p)(1) of the Act. 415 ILCS 5/21(a), (e)(1), (e) (2010). Mot. at 2. The People argue that the respondents have admitted to all material allegations by failing to file any responsive pleadings, and, therefore, there is no material fact in dispute. Mot. at 6. The People also argue that “the Respondents open dumped waste at a site that does not meet the requirements of the Act or regulations and standards thereunder and in a manner that resulted in litter.” Mot. at 2. The People further argue that they “are entitled to a judgment as matter of law.” *Id.*

RESPONDENTS’ RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT

Neither Byrom Ward or Timothy James have responded to the People’s motion for summary judgment. The Board’s procedural rules provide that, “within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d); People v. Env’tl Health and Safety Svcs., Inc., PCB 05-51, slip op. at 13 (Jul. 23, 2009). The Board finds that by failing to respond to the People’s motion for summary judgment, the respondents have waived any objection to the Board granting the motion for summary judgment. *See id.*

DISCUSSION

The Board finds that summary judgment is appropriate for both respondents. In the one-count complaint, the People allege that the respondents violated three sections of the Act, Sections 21(a), 21(e), and 21(p)(1) (415 ILCS 5 21(a), 21(e), 21(p)(1) (2010)). Each alleged violation of the Act will be discussed separately.

Section 21(a)

The record demonstrates that the respondents caused or allowed the open dumping of waste. Specifically, the record shows that the respondents disposed of the contents of transformers containing PCB-laden oil at the site. The record further shows that Byrom Ward gave the transformers to Timothy James prior to the disposal at the James residence. On or before December 20, 2007, sixty gallons of PCB-laden oil spilled onto the ground at the James residence. Compl. at 2 (P2).

“Open dumping” is defined to include consolidation of refuse (defined as being equivalent to “waste”), at a facility which does not meet the requirements of the Act. 415 ILCS 5/21(a) (2010). As an unpermitted facility, the James residence did not meet the requirement of the Act that a permit for waste disposal operations is required (*see, e.g.*, 415 ILCS 5/21(d)(1) (2010)). The transformers and PCB-laden oil were discarded by Timothy James at his residence. As discarded material, the transformers and PCB-laden oil meet the definition of “waste” found in Section 3.535 of the Act (415 ILCS 5/3.535 (2010)).

By causing and allowing the disposal of the transformers and PCB-laden oil at the James residence, the respondents caused and allowed the consolidation of refuse at a disposal site that did not meet the requirements of the Act. Therefore, respondents caused and allowed the open dumping of waste in violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2010)).

The Board finds that the facts deemed admitted pursuant to Section 103.204(d) of the Board's rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that the respondents violated Section 21(a) of the Act (415 ILCS 5.21(a) (2010)). The Board further finds that the People are entitled to judgment as a matter of law and the Board grants the motion for summary judgment and finds that respondents violated Section 21(a) of the Act (415 ILCS 5/21(a) (2010)).

Section 21(e)

Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) requires that waste disposal must be conducted at a site or facility meeting the requirements of the Act. By consolidating and disposing of the transformers and the PCB-laden oil at the James residence, the respondents operated a waste disposal site. The record demonstrates that Byrom Ward and Timothy James did not obtain the required permitting to dispose transformers and PCB-laden oil at the James residence. Mot. at 4-5. The respondents therefore violated the Section 21(e) of the Act (415 ILCS 5/21(e) (2010)), by not obtaining the required permits to operate a waste disposal site in Illinois.

The Board finds that the facts deemed admitted pursuant to Section 103.204(d) of the Board's rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that the respondents violated Section 21(e) of the Act (415 ILCS 5.21(e) (2010)). The Board further finds that the People are entitled to judgment as a matter of law and the Board grants the motion for summary judgment and finds that respondents violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)).

Section 21(p)(1)

Section 21(p)(1) of the Act states that no person shall, in violating Section 21(a) of the Act, cause or allow the open dumping of any waste in a manner which results in "litter" at a dump site. 415 ILCS 5/21(p)(1) (2010). The Board has relied upon the definition of "litter" under the Litter Control Act when addressing alleged violations of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2010) in St. Clair County v. Louis Mund.³ AC 90-64, slip op. at 6 (Aug. 22, 1991). Section 3(a) of the Litter Control Act defines "'Litter' . . . [as] discarded, used or unconsumed substance or waste. 'Litter' may include, but is not limited to, any garbage, trash, refuse, debris, rubbish" 415 ILCS 105/3(a) (2010). The record shows that the transformers and PCB-laden oil are refuse and that the transformers and PCB-laden oil were discarded at the James residence. Therefore, the respondents and finds that respondents violated Section 21(p)(1) of the Act (415 ILCS 21(p)(1) 5/21(p)(1) (2010)).

³ In Louis Mund, the Board cites to Section 21(q)(1) of the Act. Section 21(p)(1) was formerly codified as Section 21(q)(1) of the Act.

The Board finds that the facts deemed admitted pursuant to Section 103.204(d) of the Board's rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that the respondents violated Section 21(p)(1) of the Act (415 ILCS 5.21(e) (2010)). The Board further finds that the People are entitled to judgment as a matter of law and the Board grants the motion for summary judgment for violating Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2010)).

PENALTIES

Having found that the respondents violated Sections 21(a), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(e), 21(p)(1) (2010)), the Board must now determine appropriate penalties in this case. In evaluating the record to determine the appropriate penalty, the Board considers the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). However, the People have neither argued an appropriate penalty amount nor discussed the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). Therefore, the Board reserves ruling on penalties against Byrom Ward and Timothy James.

The Board directs the People to brief the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). The People must file such brief by August 8, 2011. The Board will give Byrom Ward and Timothy James an opportunity to respond to the People's brief regarding penalties for a period of 30 days after service of the People's final brief. The Board will issue a final opinion and order assessing an appropriate civil penalty after the briefs have been filed. *See id.*; 415 ILCS 5/42(a) (2010).

CONCLUSION

The Board finds that there is no genuine issue of material fact and grants the People's unopposed motion for summary judgment against the respondents. The Board further finds that the respondents violated Sections 21(a), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(e), 21(p)(1) (2010)), as alleged in the People's one-count complaint. Consistent with this opinion and order, the Board directs the People and Byrom Ward and Timothy James to brief the issue of penalties and the factors Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). The Board will issue a proper penalty to Byrom Ward and Timothy James when rendering a final decision.

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

ORDER

1. The Board grants the motion for summary judgment filed by the Office of the Attorney General, on behalf of the People of the State of Illinois (People), and finds that Byrom Ward, d/b/a Ward Electric, and Timothy James violated Sections 21(a), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(e), 21(p)(1) (2010)).

2. The Board directs the People to brief the issue of penalties and the factors of the Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). The People's brief regarding penalties must be filed by August 8, 2011, 30 days after the Board's July 7, 2011 interim order.
3. The Board directs Byrom Ward, d/b/a Ward Electric, and Timothy James to respond to the People's brief regarding penalties within 30 days after service of the People's brief regarding penalties.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on July 7, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board