

this deadline was served on both respondents. Neither respondent filed an answer to the complaint or raised an affirmative defense.

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. On July 7, 2011, the Board granted the motion for summary judgment, finding the facts alleged in the complaint were deemed admitted. The Board directed the parties to brief the issue of civil penalties.

On August 8, 2011, the People filed a request for civil penalties (Br.). Neither respondent filed a response to the request.

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.

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 (¶3,6). Timothy James then spilled approximately sixty gallons of polychlorinated biphenyl-laden oil onto the ground of his residence. *Id.* at ¶7. 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.* at ¶9.

During a January 3, 2008 inspection, the Illinois Environmental Protection Agency (Agency) visited the James residence in White County. Compl. at 2 (¶9). 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.

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

Id. at 3 (¶10). 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, Byrom Ward requested that Environmental Technologies, Inc. remediated the PCB contamination at the James residence at the request of Byrom Ward. Compl. at 3 (¶11). 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.* (¶12). The Agency re-inspected the James residence on August 8, 2008. *Id.* (¶13). 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 by Fred Schultz, the owner of the James property. *Id.* (¶13).

FINDING OF VIOLATION

In a July 7, 2011 order, the Board found that summary judgment was appropriate for both respondents. *See People v. Byrom Ward and Timothy James*, PCB 10-72 (Jul.7, 2011). 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)). The Board found that 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 (¶2).

“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)).

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.

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 violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2010).

STATUTORY PROVISIONS RELATING TO PENALTIES

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:

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.

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).

PENALTIES

The Board will first address the People’s arguments on the issue of appropriate civil penalty and then address the respondent’s failure to respond.

People’s Arguments

The People note that the Act authorizes the imposition of civil penalties where there has been a violation, 415 ILCS 5/42(a) (2010), and the Board has broad discretionary powers to assess such civil penalties under the statutory authority vested by the Act. Br. at 2, citing ESG Watts, Inc. v. IPCB, 282 Ill. App. 3d 43, 50-51 (4th Dist. 1996); Modine Manufacturing Co. v. IPCB, 193 Ill. App. 3d 643, 647 (2d Dist. 1990). The People argue that while violations of the Act are taken seriously, additional factors set forth in Sections 33(c) and 42(h) of the Act must be considered in establishing an appropriated civil penalty. Br. at 2-3.

The People further note that the maximum penalty that the respondents are liable for is \$3,900,000 for each respondent. Br. at 3-4. The People arrive at this figure by adding the three violations of the Act along with the number of days the violations continued. Under Section 42(a) of the Act a maximum penalty of \$50,000 for each violations and \$10,000 per day that the violations continue. The People argue that for three violations a total of \$150,000 civil penalty can be assessed. Br. at 3. Additionally, the People claim that the violations continued for 125 days so \$3,750,000 can be assessed. Br. at 4.

Section 33(c) Factors

The People maintain that the PCBs spilled are a hazardous pollutant and are known to cause health problems in children and adults. Br. at 4. The People concede that the area of the spill was a small contained area; however, the improper disposal of PCBs threatened both human health and the environment. Br. at 4-5. Further, the People claim that there was no measurable social or economic benefit to the improper disposal of waste at the James' residence and such disposal was not suitable for residential property. Br. at 5.

The People assert that compliance with the Act by proper disposal was technically feasible and economically reasonable. Br. at 5. The People note that Byrom Ward did hire consultants to properly remediate the contamination at the James' property and is thus partially responsible for subsequent compliance. *Id.*

Section 42 (h) Factors

The People argue that respondent improperly disposed of electrical transformers at the James' residence on or before December 20, 2007 and did not come into compliance until April 23, 2008. Br. at 6. The People claim that the gravity of the violation weighs "moderately heavy, as a moderate amount of hazardous contaminants" were dumped at the James' residence. *Id.* Furthermore, the People argue that the respondents did not exercise due diligence to comply with the Act. *Id.* The People assert that Byrom Ward is a licensed electrician and, despite being knowledgeable with the electrical industry, improperly disposed of the electrical transformers. *Id.* Furthermore, Timothy James undertook the responsibility for disposing of the electrical transformers without any diligence in becoming knowledgeable about proper disposal. *Id.*

The People claim that a moderate economic benefit was incurred by the respondents because neither respondent initially paid for proper disposal. Br. at 7. The People note that both respondents live "in a very small community where financial resources are often limited." *Id.* The People assert that based on the facts in this proceeding a penalty of \$5,000 for Byrom Ward and \$7,000 for Timothy James will serve to deter future violations of the Act. The People are unaware of any previously adjudicated violations and the respondents did not self-report the violations. The People note that a supplemental environmental project is not at issue in this matter.

Respondent's Response

Both Byrom Ward and Timothy James failed to file an respond to the People's request for civil penalties. Pursuant to the Section 101.500(d):

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 or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

Thus, respondents' have waived objection to the imposition of a civil penalty.

DISCUSSION

The Board will discuss each of the Section 33(c) and 42(h) factors below. The Board will then explain the reasoning for the civil penalty being assessed.

Section 33(c) Factors

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People

In this case, the Board had found that the respondents open dumped electrical transformers at the residence of one of the respondents. Those transformers then leaked PCBs which are known to cause neurobehavioral and immunological changes in children, skin conditions in adults, and cancer in animals. Thus, the potential injury is significant. However, the actual size of the spill was confined to a small area. Therefore, The Board finds that this factor weighs both in favor of and against respondents.

The Social and Economic Value of the Pollution Source

The area where the spill occurred is a residence and the People assert there is no "measurable" economic or social benefit to the improper disposal. The Board finds no evidence in the record as to the social and economic value of the pollution source. Therefore, the Board finds that this factor weighs neither in favor of nor against respondents.

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

The People assert that disposal of electrical transformers on residential property is not suitable. The Board agrees and finds that this factor must be weighed against respondents.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

The People argue that compliance with the Act is technically practical and economically reasonable. The Board agrees that proper disposal of materials is technically practicable and economically reasonable. Therefore, this factor must be weighed against respondents.

Any Subsequent Compliance

Byrom Ward contracted with appropriate professionals to remediate the site. The remediation occurred a little over a month after the Agency's inspection of the James site. The Board finds that this factor weighs in favor of Byrom Ward. However, as Timothy James did not assist in the subsequent compliance at the site, the Board finds that this factor weighs against Timothy James.

Finding on Section 33(c) factors

The Board finds that factors in Sections 33(c)(ii) and 33(c)(iii) justify requiring respondents to pay a civil penalty.

Section 42(h) Factors

Duration and Gravity of the Violation

The violation continued for 125 days and the improper disposal of contaminated material is a grave violation. The People argue that the gravity of the violation "weighs moderately heavy, as a moderate amount of hazardous contaminants" were improperly dumped. Br. at 6. The Board finds that improper disposal of hazardous contaminants is a grave violation; however, the Board will consider the size of the spill when determining the penalty. The Board finds that consideration of this factor aggravates the assessment of a penalty; however the limited release in this case mitigates against a substantial penalty.

Due Diligence

The People argue that the respondents did not exercise due diligence in attempting to comply with the Act. The record contains no evidence that the respondents made any attempt to properly comply with the requirements of the Act. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Economic Benefits Accrued

The People argue that a moderate economic benefit accrued because neither respondent paid for proper disposal. However, the record contains no evidence of an economic benefit accruing for the respondents. The People did not provide evidence on how much the respondents might have had to pay for proper disposal. Therefore, since the record contains no evidence of

an economic benefit, the Board finds that consideration of this factor mitigates against a substantial penalty.

Penalty Which Will Serve To Deter Further Violations

The People argue that a total civil penalty of \$12,000 will help to deter future violations. The Board agrees that a civil penalty of \$7,000 for Timothy James will deter future violations. However, the Board is not convinced that a civil penalty of \$5,000 against Byrom Ward is necessary to deter future violations. Therefore, the Board finds that that consideration of this factor mitigates against a substantial penalty.

The Number, Proximity In Time, And Gravity Of Previously Adjudicated Violations Of This Act By The Violator

The record contains no evidence of prior adjudicated violations and the People indicate that they are unaware of any previous violations. The Board finds that that consideration of this factor mitigates against a substantial penalty.

Self Disclosure

The respondents did not self disclose the violations. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Supplemental Environmental Project

A supplemental environmental project is not at issue in this proceeding, so this factor neither aggravates nor mitigates the assessment of a penalty.

Appropriate Civil Penalty

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) and 42(h) (2010)). People v. Gilmer, PCB 99-27 (Aug. 24, 2000). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Gilmer, PCB 99-27, slip. op. at 8.

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, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990), slip. op. at 72. The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. *See* 415 ILCS 5/42(a) and (b) (2008). Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act and an additional civil penalty not to exceed \$10,000 for each day during which the

violation continues. By multiplying the number of sections of the Act that respondents violated (three) a potential civil penalty of \$150,000 is reached. Add to that sum, a civil penalty of \$10,000 a day for 125 days of noncompliance with each of these sections, the total maximum penalty that could be assessed against each respondents is \$3,900,000. The complainant requests an imposition of civil penalties in the amount of \$5,000 for Byrom Ward and \$7,000 for Timothy James.

The Board has reviewed the record in this proceeding. The record contains no evidence of what if any economic benefit accrued, but does provide evidence that Byrom Ward hired proper professionals to assist in remediation. However, the record demonstrates that Timothy James did not participate in the remediation of the site. The record also establishes that hazardous contaminants were released, but no evidence of the impact of that release has been provided. Based on this record, the Board is convinced that a civil penalty is appropriate; however the penalty sought by the People as to Byrom Ward does not sufficiently account for his remediation activities. The Board finds that a civil penalty of \$3,500 is appropriate for Byrom Ward as such a penalty will recoup any economic benefit accrued and will deter future violations. However, the Board also finds that a civil penalty of \$7,000, twice the penalty assessed against Byrom Ward, is appropriate for Timothy James in light of his failure to assist in any subsequent compliance. A civil penalty of \$7,000 will recoup any economic benefit accrued by Timothy James and will deter future violations. Therefore the Board finds that Byrom Ward must pay a civil penalty of \$3,500 and Timothy James must pay a civil penalty of \$7,000. To reiterate, Byrom Ward's penalty is less due to the mitigating factor of obtaining subsequent compliance.

CONCLUSION

The Board 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. The Board directs Byrom Ward to pay a civil penalty of \$3,500 and Timothy James to pay a civil penalty of \$7,000. The Board finds that these civil penalties will recoup any economic benefit accrued and deter future violations of the Act.

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

ORDER

1. The Board 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 hereby assesses a penalty of three thousand five hundred dollars (\$3,500) against Byrom Ward, d/b/a Ward Electric and seven thousand (\$7,000) against Timothy James. Respondents must pay this penalty no later than January 3, 2012, which is the first business day following the 30th day after the date of this order. Respondents must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number,

case name, and respondents' federal employer identification numbers must be included on the certified check or money order.

3. Respondents must send the certified check or money order to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2008)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2008)).
5. Respondents must cease and desist from the alleged violations.

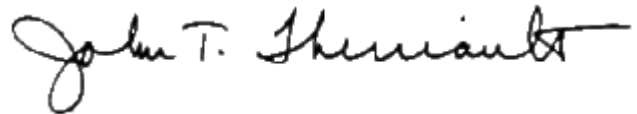
IT IS SO ORDERED.

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) (2008); *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.

IT IS SO ORDERED.

Member Zalewski concurred.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 1, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board