

ILLINOIS POLLUTION CONTROL BOARD
October 6, 2011

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 11-26
) (Enforcement – Land)
 LOWELL NULL, d/b/a MAB PALLETS,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by C. K. Zalewski):

This enforcement action was filed in December 2009 by the Office of Attorney General, on behalf of the People of the State of Illinois (“People” or “complainant”), against Lowell Null, d/b/a MAB Pallets, (“Mr. Null” or “respondent”). The complaint concerns respondent’s activities at a facility located at 1100 South Second Avenue, Hoopeston, Vermillion County.

Mr. Null has failed to participate in status conferences concerning the case, file an answer, or respond to requests to admit the genuineness of facts. On August 18, 2011, the People filed a motion for summary judgment. The People argue that no genuine issues of material fact remain and that the People are entitled to judgment as a matter of law. Mr. Null did not file a response to the People’s motion for summary judgment.

For the reasons discussed below, the Board grants the People’s motion for summary judgment as to Counts I and II of the complaint. The Board finds that Lowell Null violated, in numerical order, Sections 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Illinois Environmental Protection Act (“Act”), (415 ILCS 5/9(a), 9(c), 21(a), 21(e), and 21(p)(3) (2010)). The Board orders Mr. Null to cease and desist from violating the Act and associated regulations and orders him to pay a civil penalty in the amount of \$8,000, the amount requested by the People.

In this opinion and order, the Board first reviews the procedural history of this case. The Board next summarizes the People’s complaint and the uncontested facts. The Board then sets forth the relevant statutory and regulatory provisions and describes the standard of review applied by the Board in considering motions for summary judgment. After summarizing the People’s motion for summary judgment, the Board provides a discussion and ruling on the People’s motion for summary judgment. Finally, the Board will discuss the appropriate remedy after considering the 33(c) and 42(h) factors of the Act (415 ILCS 5/33(c) and 42(h) (2010)).

PROCEDURAL HISTORY

On December 9, 2010, the People filed a two-count Complaint (“Comp.”) against Mr. Null. On December 11, 2010, the People served Mr. Null with the complaint. This is evidenced by the “green card” certified mail receipt the People filed on December 15, bearing Mr. Null’s signature with a handwritten December 11, 2011 receipt date. On December 16, 2010, the Board accepted the complaint for hearing.

On January 10, 2011, as evidenced in the hearing officer’s written order, the respondent was absent from the first scheduled telephonic status conference. Hearing Officer Order Jan. 10, 2011. The respondent was ordered to contact complainant’s attorney with a valid telephone number at which to reach him; the order was mailed to Respondent. Respondent was reminded that his answer to the complaint was due by February 14, 2011, and both parties were directed to participate in a telephone status conference with the Hearing Officer on March 7, 2011. The March 7 conference was postponed until March 21, 2011. Hearing Officer Order of Feb. 9, 2011. At that conference, respondent was again absent, but the People had communicated with him and reported that he had planned to work on the site in the spring. Hearing Officer Order of March 21, 2011. Respondent, who reportedly made no progress on the site, was absent from the May 2 conference, and again from the June 6 status conference. Hearing Officer Orders of May 2, 2011 and June 6, 2011.

On June 17, 2011, the complainant served respondent with a Request for Admission of Fact and Genuineness of Documents. The respondent has not filed any response. The People filed a Motion for Summary Judgment against respondent (“Mot.”) on August 18, 2011. Respondent has again failed to file a response.

THE PEOPLE’S COMPLAINT AND MR. NULL’S FAILURE TO ANSWER

In the first count of the December 2010 two-count complaint, the People allege that MAB Pallets, LLC was registered as a domestic limited liability company in Illinois on May 14, 2007, and was involuntarily dissolved on November 14, 2008. MAB Pallets had one LLC member named Lowell Null. Since MAB Pallets dissolved, Mr. Null continues to operate out of the former MAB office at 1100 South Second Avenue, Hoopston, Vermillion County, Illinois. Comp. at 2, ¶3-4. Among other activities, Mr. Null sold chipped wood and mulch at the Site. Id. at 2, ¶8, 11.

An inspector employed by the Illinois Environmental Protection Agency (Agency) conducted inspections on six occasions during a roughly three-year period, *i.e.*, May 29, 2007, January 22, 2008, May 19, 2009, May 18, 2010, July 20, 2010, and March 23, 2011. During this time, Mr. Null had on his property between 1,000 and 8,000 cubic yards of broken and shredded pallets and other refuse on six occasions over a period of nearly three year. Comp. at 2 (¶ 6-15). According to the complaint, the Respondent violated Sections 21(a) and 21(e) of the Act (415 ILCS 5/21(a), 21(e) (2010)). Comp. at 4 (¶ 23-24).

Specifically, count one alleges that respondent violated Section 21(a) of the Act (415 ILCS 5/21(a) (2010)) by “consolidating waste materials at a site which is neither permitted by

the Illinois EPA as a sanitary landfill, nor meets the requirements of the Act and of the regulations and the standards promulgated thereunder . . . causing or allowing the open dumping of waste.” *Id.* at 4 (¶23). Also, count one alleges that respondent violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) by “disposing, storing, or abandoning waste at a site that does not meet the requirements of the Act.” *Id.* (¶ 24).

In count two, the People allege that Mr. Null also burned waste on the property in question. *Id.* at 5 (¶ 25). According to count two, the Respondent violated Sections 9(a), 9(c), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(p)(3) (2010)). Specifically, count two alleges that Respondent violated Section 9(a) of the Act (415 ILCS 5/9(a) (2010)) by “causing or allowing the emission of contaminants into the environment so as to cause or tend to cause air pollution.” *Id.* at 6 (¶ 32). The complaint also alleges that Respondent violated Section 9(c) of the Act (415 ILCS 5/9(c) (2010)) by “causing or allowing the open burning of refuse at a site that does not meet the requirements of the Act.” *Id.* (¶ 33). Finally, the complaint alleges that Respondent violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2010)) by “causing or allowing the open dumping of waste which resulted in open burning.” *Id.* (¶ 34). The People’s complaint in both counts requested the Board to order the Respondent to cease and desist from any further violations and to pay civil penalties as well as costs and attorney’s fees. *Id.* at 4, 6.

Mr. Null failed to file an answer to the People’s complaint. 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).

PEOPLE’S REQUEST FOR ADMISSIONS OF FACT AND GENUINENESS OF DOCUMENTS AND MR. NULL’S FAILURE TO FILE A RESPONSE

The People served the respondent with a Request for Admission of Fact and Genuineness of Documents on June 17, 2011. Mr. Null failed to file a response to the request. Mot. at 1. Pursuant to the Board’s procedural rules, “[e]ach of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters, or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.” 45 Ill. Adm. Code 101.618(f).

FACTS DEEMED ADMITTED

Respondent has repeatedly failed to participate in conferences and failed to respond at any point in these proceedings. The Complaint’s Notice of Electronic Filing and the order of the Board accepting the complaint both detail the consequences of failing to respond. People v. Null, PCB 11-26, slip op. at 1, (December 16, 2010). Four telephone hearings were held, all of which the respondent failed to take part in. The orders and notice of the meetings were mailed to

the respondent at the location at which the inspectors met and spoke with Mr. Null. Eight months separate the filing of the initial Complaint and the Motion for Summary Judgment during which the respondent could have, but did not respond. Based on respondent's failure to file an answer to the complaint or to file a response to the request to admit facts, the Board finds that the following facts are deemed admitted.

On November 14, 2008, MAB Pallets, LLC was involuntarily dissolved, and Lowell Null, the only member of the former LLC, continued to operate the site and principal office of MAB Pallets, located at 1100 South Second Avenue, Hoopeston, Vermillion County, Illinois. Mot. at 5. This site is not permitted as a sanitary landfill by the Illinois EPA. *Id.*

Between May 29, 2007, and July 20, 2010, the Illinois EPA conducted six inspections of the site. Mot. at 2. On these occasions, the inspectors found between 1,000 and 8,000 cubic yards of broken and shredded pallets and refuse, varying between inspections. *Id.* The inspectors informed Mr. Null that he was not permitted to use the property in this manner, and suggestions were made as to how he could legally dispose of the material. Exhibit 1A, C, D. During the May 18, 2010, inspection, the inspector observed two areas where burning had occurred and a small pile of debris still smoldering. Exhibit E. Mr. Null confirmed that he had burned some material, and that he had permission from the city, but had not contacted the Illinois EPA. *Id.* The inspector determined at the City Clerks Office that no permission had been given to burn at the site. *Id.* Records indicate that Mr. Null sold chipped wood and mulch in September 2007 and March and April 2008. Exhibit B. No other sales records are on record. Refuse remained during the March 23, 2011, inspection of the property. Mot. at 6.

STATUTORY AND REGULATORY PROVISIONS

Section 101.516(b) of the Board's Procedural regulations, 35 Ill. Adm. Code 101.516(b), provides as follows:

- (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

Section 21(a) of the Act provides as follows:

No person shall:

- (a) Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2010).

Section 21(e) of the Act provides as follows:

No person shall:

- (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. 415 ILCS 5/21(e) (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 5/3.300 (2010).

Section 3.315 of the Act provides as follows:

"Person" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, 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 3.445 of the Act provides 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. ... 415 ILCS 5/3.445 (2010).

Section 3.535 of the Act provides as follows:

"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 (2010).

Section 9(a) of the Act provides as follows:

No person shall:

- (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to

cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act. 415 ILC 5/9(a) (2010).

Section 9(c) of the Act provides as follows

No person shall:

- (c) Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act; except that the Board may adopt regulations permitting open burning of refuse in certain cases upon a finding that no harm will result from such burning, or that any alternative method of disposing of such refuse would create a safety hazard so extreme as to justify the pollution that would result from such burning. 415 ILCS 5/9(c) (2010).

Section 21(p)(3) of the Act provides as follows:

No person shall:

- ***
- (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:
 - ***
 - (3) open burning
 - ***

Section 3.165 of the Act provides as follows:

"Contaminant" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source. 415 ILCS 5/3.165 (2010).

Section 3.115 of the Act provides as follows:

“Air pollution” is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.115 (2010).

STANDARD OF REVIEW FOR MOTIONS OF 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).

PEOPLE’S MOTION FOR SUMMARY JUDGMENT

In their two-count complaint, the People have alleged five violations of the Act, specifically Sections 21(a), 21(e), 9(a), 9(c), and 21(p)(3). 415 ILCS 5/21(a), 21(e), 9(a), 9(c), and 21(p)(3) (2010). Mot. at 1. The People argue that all statements and matters of fact and the genuineness of each document in the Request for Admission of Fact and Genuineness of Documents should be deemed admitted by respondent for failure to respond. *Id.* at 1-2. They argue that there is therefore no genuine issue of material fact, and they are entitled to judgment as a matter of law. *Id.* at 2. The People also argue “that the Respondent caused or allowed open dumping and disposal of waste at a site that does not meet the requirements of the Act or regulations.” *Id.* at 14. The People further argue “that Respondent’s open dumping resulted in open burning and emission of contaminants into the environment so as to tend to cause air pollution.” *Id.*

As remedy for the violations, the People request entry of a cease and desist order and imposition of an \$8,000 penalty. Mot. at 15.

RESPONDENT’S FAILURE TO RESPOND TO THE MOTION FOR SUMMARY JUDGMENT

Mr. Null has not 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 respondent has waived any objection to the Board granting the motion for summary judgment. *See id.*

DISCUSSION

As previously stated, the Board deems all facts admitted. Consequently no genuine issues of material fact remain. The Board next examines whether the People are entitled to summary judgment as a matter of law. In the two-count complaint, the People allege that the respondent violated five sections of the Act, in numerical order, Sections 9(a), 9(c), 21(a), 21(e), and 21(p)(3) (415 ILCS 5/9(a), 9(c), 21(a), 21(e), and 21(p)(3) (2010)). Each alleged violation is discussed separately.

Section 9(a)

The record indicates evidence of burning of waste on the Respondent's property, including a still smoldering pile. Such burning would necessarily emit contaminants into the air in violation of the Act. (415 ILCS 5/9(a) (2010)). The respondent admitted to burning the waste, but claimed to have a permit from the city. The record indicates that he did not.

"Contaminant" is defined as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2010). The nature of burning wood is that it emits contaminants, as defined above. This, along with other sources of contaminants, causes or tends to cause air pollution in Illinois in violation of the Act. 415 ILCS 5/9(a) (2010).

By causing or allowing the burning of waste on his property, the respondent "caus[ed] or ... allow[ed] the discharge or emission of [a] contaminant into the environment ... so as to cause or tend to cause air pollution." Therefore, the Respondent caused or allowed the emission of a contaminant into the environment so as to cause or tend to cause air pollution in violation of the Act. 415 ILCS 5/9(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 respondent violated Section 9(a) of the Act (415 ILCS 5/9(a) (2010)). The Board further finds that respondent violated Section 9(a) of the Act (415 ILCS 5/9(a) (2010)).

Section 9(c)

Section 9(c) of the Act (415 ILCS 5/9(c) (2010)) forbids the Respondent from causing or allowing the open burning of refuse unless given permission by the Board. The record shows that Respondent burned waste, and admitted doing so. He did not have permission from the city, as he claimed, or from the Board, as required by the Act. The Respondent therefore violated Section 9(c) of the Act (415 ILCS 5/9(c) (2010)) by openly burning waste on his property without permission.

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 Respondent violated Section 9(c) of the Act (415 ILCS 5/9(c) (2010)). The Board further finds that Respondent violated Section 9(c) of the Act (415 ILCS 5/9(c) (2010)).

Section 21(a)

The record demonstrates that the respondent caused or allowed the open dumping of waste on his property, which did not meet the requirements of the Act or its regulations. Specifically, the record shows that he had collected on his property between 1,000 and 8,000 cubic yards of broken pallets and other waste. The respondent sold some of the waste, but never significantly decreased the amount remaining on his property for approximately three years.

“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 respondent’s property 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 broken pallets remained on respondent’s property without a plan to reduce the amount. As discarded material, with no plan to sell or dispose of properly, the pallets 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 pallets at the respondent’s property, the respondent caused and allowed the consolidation of refuse at a disposal site that did not meet the requirements of the Act. Therefore, respondent 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)

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 pallets on the respondent’s property, the respondent operated a waste disposal site. The record demonstrates that Mr. Null did not obtain the required permitting to dispose of pallets and other waste on his property. Mot. at 4-5. The respondent therefore violated 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 respondent violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)). The Board further finds that respondent violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)).

Section 21(p)(3)

Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2010)) forbids open dumping of waste that results in open burning. Both acts have already been discussed individually. Inspectors had observed open dumping on the Respondent’s property on three occasions prior to the inspection during which they found evidence and heard admission of burning. This property owned by Respondent was the location of open dumping of waste as well as the burning of waste. It logically follows that the open dumping resulted in the open burning. The Respondent therefore violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2010)) by openly dumping waste on his property that resulted in open burning.

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 Respondent violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2010)). The Board further finds that respondent violated Section 21(p)(3) of the Act (415 ILCS 5/21(p)(3) (2010)).

Ruling on Motion for Summary Judgment

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 respondent violated Section 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3) (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 Counts I and II, and finds that respondent violated, in numerical order, Section 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3) (2010)).

REMEDY AND PENALTIES

Having found that the respondent violated Sections 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), and 21(p)(3) (2010)), the Board must now determine appropriate an remedy, including 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)). The People request entry of a cease and desist order and imposition of an \$8,000 penalty.

Section 33(c) of the Act provides, in pertinent part, that:

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.

Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipally owned or publicly regulated company, the Board shall at least 30 days prior to the scheduled date of the first hearing in such proceeding, give notice of the date, time, place, and purpose of such hearing by public advertisement in a newspaper of general circulation in the area of the State concerned. The Board shall conduct a full and complete hearing into the social and economic impact which would result from restriction or denial of the right to use such facilities and allow all persons claiming an interest to intervene as parties and present evidence of such social and economic impact.

415 ILSC 5/33(c) (2010).

Addressing the factors at Section 33(c) of the Act (415 ILCS 5/33(c) (2010)), the complainant first states that the initial inspection of the respondent's property was a result of complaints concerning local children playing at the site, implying a danger to children caused by the state of the respondent's property. Mot. at 12. The first inspection report notes that children had become ill following their time on respondent's property. Exhibit A. Even without such reports in the record, a site with open dumping of pallets and other waste, including burning waste, is not safe, especially when adequate measures have not been taken to prevent entry of children to the property. Such a danger militates against the respondent, who has repeatedly failed to remedy the violation and create a safer condition on his property. This factor weighs against Mr. Null.

As to the social or economic value of the pollution, there is none as the pallets and other waste sit unused on the property. Mot. at 12. There are no beneficial effects of dumping or burning the waste on respondent's property for society. The materials could be beneficial, come if the respondent were to put the waste to use, such as converting the pallets to mulch as he did on several occasions or selling the waste to a waste or power facility. Idle waste, however, is not of social or economic benefit. Therefore, there is no value to society to mitigate the danger and harm of open dumping and burning. This factor weighs against Mr. Null.

The disposal of the pallets and other waste as well as the open burning was not suited for the site. *Id.* Respondent did not have permits for open dumping or burning. Mot. at 5. He claimed that he had permission from the city, but there is no proof of that. Mot. Exhibit E. Also, the site is not suitable for such uses due to the children living nearby. Mot. Exhibit A. The use of the property in a manner not suited for the site supports Complainant's prayer for relief. This factor weighs against Mr. Null.

The disposal or recycling of the material is both technically and economically feasible. Mot. at 13. The record shows that the respondent was able to sell the waste on several occasions. Exhibit B. The respondent informed Inspector Kenneth Keigley on January 22, 2008 that he had sold ten to twelve truckloads to a customer for mulch around trees. Mot. Exhibit C. The record also indicates that the inspectors made suggestions of possible purchasers of the waste, including a power plant. Mot. Exhibit D. The respondent was entirely capable of disposing of the waste

on his property, and his failure to do so favors the relief suggested by complainant. This factor weighs against Mr. Null.

Finally, the respondent has not properly disposed of the waste. Mot. at 13. Again, respondent had no permits for open dumping or burning. Mot. at 5. This factor weighs against Mr. Null.

The foregoing factors all favor the relief requested by the complainant as the dumping and burning on the respondent's property was not in accordance with the requirements and expectations of the law and society and was of no benefit thereto.

The Board next applies the factors of Section 42(h) to consider whether to impose the \$8,000 penalty requested by the People. As of the August 18, 2011 filing of the People's motion for summary judgment, Section 42(h) of the Act provided¹:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, 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;

¹Effective August 23, 2011, P.A. 97-519 added a new subsection (8) to Section 42(h), which provides:

(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.

This provision was not addressed in the People's motion, and accordingly is not considered by the Board in its 42(h) factor evaluation.

(5) the number, proximity in time, and gravity of previously adjudicated violations of this 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; and

(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 .

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2010).

Section 42 (h) articulates the aggravating and mitigating factors that the Board weighs in determining an appropriate civil penalty (see 415 ILCS 5/42(h) (2010)). The first two factors relate to the duration and gravity of the violation, and any due diligence of respondent in attempting to comply. See 415 ILCS 5/42(h)(1) and (2) (2010). The pallets and other waste have remained on the respondent’s property since May 29, 2007 or before, thus the violation has been ongoing for at least three years. Mot. at 13. Although the respondent has sold some of the waste on several occasions, large amounts of the waste have remained on the property with no further attempts to reduce the volume. *Id.* at 14. Therefore, the duration of the violation has been extensive, and the respondent has not been diligent in coming into compliance. The large amount of waste, as well as the circumstance that led to the Agency learning of the violation (the children playing on the property) leads the Board to conclude that the violation is moderately grave.

The record here does not quantify the amount of any economic benefit under Section 42(h)(3) that the respondent has accrued as a result of avoiding proper disposal of the waste. Mot. at 14. 415 ILCS 5/42(h)(3) (2010). In the absence of any contrary evidence or argument, the Board must find that the People’s penalty request includes the amount of any such benefit.

The complainant argues that that the \$8,000 penalty suggested will deter further violations and encourage compliance in the future. Mot. at 14. 415 ILCS 5/42(h)(4) (2010). In the absence of any contrary evidence or argument, the Board finds that the People’s penalty request is appropriate.

Under Section 42(h)(5), the complainant stated that it was unaware of any previous adjudications of violations of the Act. 415 ILCS 5/42(h)(5) (2010). This suggests that a higher-than-requested penalty is not necessary.

Reviewing the factors of Section 42(h)(6) and (7), the People state that the respondent did not self-report the alleged violations and did not agree to perform a supplemental environmental project. Mot. at 14. 415 ILCS 5/42(h)(6), (7) (2010). No aggravation or mitigation of the penalty is warranted on account of these two factors.

In summary, the respondent's violation has continued over a three year period of time. Respondent knew of the violations, but this record indicates that he has done nothing to come into compliance. Respondent has not filed any answer to the complaint, has not participated in status conferences, or responded to the People's motions to deem facts admitted or for summary judgment. Therefore, based on this record, the Board assesses the \$8,000 civil penalty requested by the People, finding that it is sufficient to encourage future compliance by Mr. Null and others similarly situated, but it is not excessive based on this record.

CONCLUSION

In summary, the Board finds that there is no genuine issue of material fact and that the People are entitled to summary judgment as a matter of law. The Board accordingly grants the People's unopposed motion for summary judgment against the respondent. The Board further finds that the respondent violated Sections 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3) (2010)), as alleged in the People's two-count complaint. Having considered the factors of Sections 33(c) and 42(h) of the Act, the Board enters a cease and desist order and assesses the \$8,000 civil penalty requested by the People.

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

ORDER

1. The Board grants the unopposed motion for summary judgment filed by the Office of the Attorney General, on behalf of the People, and finds that Lowell Null, d/b/a MAB Pallets, violated Sections 9(a), 9(c), 21(a), 21(e), and 21(p)(3) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3) (2010)).
2. Respondent Lowell Null must pay a civil penalty of \$8,000 no later than Monday, November 7, 2011 which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and Lowell Null's social security number or federal employer identification number must be included on the certified check or money order.

3. Respondent must send the certified check, money order, or confirmation of electronic funds transfer 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) (2010)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2010)).
5. Respondent Lowell Null must cease and desist from further violations of the Act.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the board adopted the above opinion and order on October 6, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board