

ILLINOIS POLLUTION CONTROL BOARD

May16, 2013

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 13-3  
) (Enforcement - Land)  
EDWARD W. FISHER, RHONDA L. )  
FISHER, and DEM/EX GROUP, INC., an )  
Illinois corporation, )  
)  
Respondents. )

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

On July 13, 2012, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a five-count complaint against Edward W. Fisher, Rhonda L. Fisher, and DEM/EX Group Inc. (DEM/EX Group) (collectively, “respondents”). The complaint concerns Edward Fisher’s and Rhonda Fisher’s residential site at 29998 East Manito Road, Manito, Mason County (residential site), as well as DEM/EX Group’s principal place of business at 805 Adams, Manito, Mason County (corporate site).

On October 29, 2012, the respondents Edward Fisher and Rhonda Fisher, represented by legal counsel, agreed to the facts in the complaint during a telephone status conference. Edward Fisher and Rhonda Fisher did not file an answer to the complaint. On October 31, 2012, the People filed a motion to deem admitted allegations in the complaint against respondent DEM/EX Group. No response was filed, and that motion was granted and facts deemed admitted on November 28, 2012. On January 8, 2013, the People filed motions for summary judgment against respondents Edward Fisher and Rhonda Fisher. On January 22, 2013, the People filed a motion for summary judgment against DEM/EX Group. None of the respondents filed a response to the People’s motions for summary judgment.

For reasons set out below, the Board grants the People’s motions for summary judgment. The Board finds that respondents violated Sections 9(a), 9(c), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(p)(3), 21(p)(7)(i)-(ii), 55(a)(1), and 55(k)(1) of the Environmental Protection Act (Act), and Section 812.101(a) of Title 35 of the Illinois Administrative Code (Board regulations). 415 ILCS 5/9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), (k)(1) (2010); 35 Ill. Adm. Code 812.101(a). The Board orders respondents to cease and desist from violating the Act and associated regulations and orders each respondent to pay a civil penalty in the amount of \$16,000, for a total civil penalty of \$48,000.

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 motions for summary judgment, the Board provides a discussion and ruling on the People's motions. Finally, the Board discusses 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 July 16, 2012, the People filed a five-count Complaint (Comp.) against respondents Edward Fisher, Rhonda Fisher, and DEM/EX Group. On or about July 16, 2012, the People served respondents with the complaint. The People filed the certified mail receipt on July 20, 2012 bearing the signatures of Rhonda Fisher (for both herself and Edward), and a representative of Cover, Shay & Evans, LLP for DEM/EX Group.<sup>1</sup> On July 26, 2012, the Board accepted the complaint for hearing.

On October 29, 2012, respondents Edward Fisher and Rhonda Fisher agreed to the facts in the complaint and stated their intent to not file an answer to the People's complaint. Hearing Officer Order Oct. 29, 2012. On October 31, 2012, the People filed a motion seeking to admit the allegations of the complaint against DEM/EX Group. On November 28, 2012, the Board granted the People's motion and deemed the allegations in the complaint admitted against DEM/EX Group. Hearing Officer Order Nov. 28, 2012. The People filed Motions for Summary Judgment against respondents Edward Fisher and Rhonda Fisher on January 8, 2013. The People filed a Motion for Summary Judgment against respondent DEM/EX Group on January 22, 2013. The separate motions (collectively "Motions") are substantively identical and share the same pagination. None of the respondents have filed a response to the People's motions.

### **THE PEOPLE'S COMPLAINT**

The People's five-count complaint is based on observations made by the Illinois Environmental Protection Agency (Agency) during inspections of both the corporate site and the residential site on August 4, 2010, and similar inspections on March 23, 2011. Comp. at 3 and 14. The complaint states that respondent Edward Fisher is the registered agent, president and secretary of respondent DEM/EX Group. Respondents Edward Fisher and Rhonda Fisher are married. *Id.* at 2. Respondent DEM/EX Group is an Illinois corporation that operates as a demolition and excavating contractor. Comp. at 2.

Count I of the complaint alleges open dumping activities at the residential site. Specifically, count I states, "The residential site was strewn with large amount of 'general construction or demolition debris' . . . intermixed with various miscellaneous wastes." Comp. at 3-4. Count I includes an extensive list of waste and debris observed by the Agency at the residential site. *Id.* Count I alleges that respondents violated Section 21(a) of the Act by causing or allowing open dumping, as observed by the Agency, "for some period prior to October 31,

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<sup>1</sup> Both Rhonda Fisher and Edward Fisher failed to date the certified mail receipt.

2010 through sometime subsequent to March 23, 2011.” 415 ILCS 5/21(a) (2010). Comp. at 7. Count I also alleges that respondents violated Sections 21(p)(1) and 21(p)(7) of the Act by causing or allowing open dumping at the residential site that resulted in both litter and the deposition of general construction or demolition debris. 415 ILCS 5/21(p)(1), (p)(7) (2010). Comp. at 7-8.

Count II alleges violations relating to respondents’ failure to obtain a permit for the activities observed at the residential site. Specifically, count II alleges that by disposing of wastes at the residential site without a permit granted by the Agency, and in violation of Board regulations, respondents violated Section 21(d)(1) and 21(d)(2) of the Act. 415 ILCS 5/21(d)(1), (d)(2) (2010). Comp. at 9. In addition, as a part of count II, the People allege that, by conducting a waste disposal operation without applying for the mandatory permit to develop and operate a landfill, respondents violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)). *Id.*

Count III of the complaint alleges open dumping violations at the corporate site. Count III includes an extensive list of waste and debris observed by the Agency at the corporate site. Comp. at 11-14. Count III alleges open dumping in violation of Section 21(a) of the Act at the corporate site. Comp. at 15. In addition, count III alleges violations of Sections 21(d)(2) and (e) of the Act arising from respondents conducting a waste storage or waste treatment or waste disposal operation while not meeting the Board’s regulations. 415 ILCS 5/21(d)(2), (e) (2010). *Id.* Count III also alleges that respondents violated Sections 21(p)(1) and 21(p)(7) of the Act by causing or allowing open dumping at the corporate site that resulted in: litter, the deposition of general construction or demolition debris, and the deposition of clean construction or demolition debris. 415 ILCS 5/21(p)(1), (p)(7)(i)-(ii) (2010). *Id.* at 15-16. Finally, count III alleges that respondents violated Section 21(p)(3) of the Act by causing or allowing open dumping of waste in a manner that resulted in open burning. 415 ILCS 5/21(p)(3) (2010). *Id.* at 15.

The People allege open dumping of used or waste tires in count IV of the complaint. Specifically, count IV alleges violations of Sections 55(a) and 55(k)(1) of the Act resulting from respondents causing or allowing water to accumulate in used or waste tires that were openly dumped at the corporate site. 415 ILCS 5/55(a), (k)(1) (2010). Comp. at 17.

Finally, count V alleges open burning violations at the corporate site. The People allege that by causing, threatening, or allowing air pollution from open burning of refuse at the corporate site, and by causing or allowing open burning of refuse at the corporate site, respondents violated Sections 9(a) and (c) of the Act. 415 ILCS 5/9(a), (c) (2010). Comp. at 19.

### **FACTS DEEMED ADMITTED**

None of the respondents filed an answer to the People’s complaint. Respondents Edward Fisher and Rhonda Fisher agreed, through their attorney, to the facts in the complaint and stated, before the Board, their intent to not file an answer. Hearing Officer Order Oct. 29, 2012. On November 28, 2012, the Board granted the People’s motion and deemed the allegations in the complaint admitted against DEM/EX Group. Hearing Officer Order Nov. 28, 2012. Therefore, the facts included in the People’s complaint are deemed admitted against all respondents.

**STATUTORY AND REGULATORY PROVISIONS**

Section 101.516(b) of the Board's procedural regulations, 35 Ill. Adm. Code 101.516(b), provides the following regarding when summary judgment is appropriate:

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- (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, show 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 9 of the Act provides:

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.

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- (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; 415 ILCS 5/9(a), (c) (2010).

Section 3.115 of the Act, "Air pollution," provides:

"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).

Section 3.300 of the Act, "Open burning," provides:

"Open burning" is the combustion of any matter in the open or in an open dump. 415 ILCS 5/3.300 (2010).

Section 3.535 of the Act, “Waste,” provides, in pertinent part:

“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 3.385 of the Act, “Refuse,” provides:

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

Section 21 of the Act provides:

No person shall:

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

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(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;

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(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.

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(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;

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(3) open burning;

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- (7) deposition of:
- (i) general construction or demolition debris as defined in Section 3.160(a) of this Act; or
  - (ii) clean construction or demolition debris as defined in Section 3.160(b) of this Act. 415 ILCS 5/21(a), (d)(1)-(2), (e), (p)(1), (3), (7)(i)-(ii) (2010).

Section 3.305 of the Act, "Open dumping," provides:

"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 of the Litter Control Act provides:

As used in this Act, unless the context otherwise requires:

- (a) "Litter" means any discarded, used or unconsumed substance or waste . . . 415 ILCS 105/3(a) (2010).

Section 3.160 of the Act, "Construction or demolition debris," provides, in pertinent part:

- (a) "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.
- (b) "Clean construction or demolition debris" means uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities. 415 ILCS 5/3.160(a)-(b) (2010).

Section 812.101 of Title 35 of the Board's regulations provides:

- (a) All 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. 35 Ill. Adm. Code 812.101(a).

Section 55 of the Act provides:

- (a) No person shall:
  - (1) Cause or allow the open dumping of any used or waste tire.

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- (k) No person shall:
  - (1) Cause or allow water to accumulate in used or waste tires. 415 ILCS 5/55(a)(1), (k)(1) (2010).

Section 54.13 of the Act provides:

“Used tire” means a worn, damaged, or defective tire that is not mounted on a vehicle. 415 ILCS 5/54.13 (2010).

Section 54.16 of the Act provides:

“Waste tire” means a used tire that has been disposed of. 415 ILCS 5/54.16 (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 Purtil 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 five-count complaint, the People have alleged twelve violations of the Act, specifically Sections 9(a), 9(c), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(p)(3), 21(p)(7)(i)-(ii), 55(a)(1), and 55(k)(1), and Section 812.101(a) of the Board's regulations. 415 ILCS 5/9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), (k)(1) (2010); 35 Ill. Adm. Code 812.101(a). The People argue that, "[t]here are no genuine issues of material fact in this instant matter and People are entitled to judgment as a matter of law." Motions at 14. The People further state, "[i]t is undisputed that Respondent[s] caused or allowed open dumping, littering and deposition of general construction or demolition debris for some period prior to October 31, 2010, through sometime subsequent to March 23, 2011 at the residential site. Respondent[s] did the aforementioned without a permit granted by the Agency and without complying with the Board's waste disposal regulations. By conducting a waste disposal operation at the residential site without applying for the mandatory permit to develop and operate a landfill, respondent[s] violated the Act and associated regulations." *Id.* at 14-15. The People make the same argument regarding the corporate site. The People request entry of a cease and desist order and imposition of a \$16,000 penalty against each respondent as a remedy in this matter. *Id.* at 15.

### **RESPONDENTS' FAILURE TO RESPOND TO THE MOTION FOR SUMMARY JUDGMENT**

None of the respondents in this action have filed a response to the People's Motions for Summary Judgment. On February 5, 2013, the respondents told the hearing officer that they did not intend to file a response to the People's motion. Hearing Officer Order Feb. 5, 2013. 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't'l 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**

As previously stated, the Board found all facts included in the People's complaint are deemed admitted against all respondents. The Board next examines whether the People are entitled to summary judgment as a matter of law. In the five-count complaint, the People allege that the respondents violated twelve sections of the Act, Sections 9(a), 9(c), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(p)(3), 21(p)(7)(i)-(ii), 55(a)(1), and 55(k)(1), and Section 812.101(a) of the Board's regulations. 415 ILCS 5/9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), (k)(1) (2010); 35 Ill. Adm. Code 812.101(a). As discussed below, the Board finds that no genuine issues of material fact remain. Each alleged violation is discussed separately.

### **Section 9(a)**

The record indicates evidence of burning of waste on the corporate site. Specifically, photographs in Complainant's Exhibit 2 to the complaint (Exh. 2) depict charred refuse at various locations at the corporate site. Exh. 2 at 19, 20, and 32. Such burning would necessarily emit contaminants into the air in violation of the Act. (415 ILCS 5/9(a) (2010)).

By causing or allowing the burning of waste at the corporate site, the respondents "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." 415 ILCS 5/9(a) (2010). Therefore, the Board finds that respondents caused or allowed the emission of a contaminant into the environment so as to cause or tend to cause air pollution in violation of Section 9(a) of the Act(415 ILCS 5/9(a) (2010)). *Id.*

### **Section 9(c)**

Section 9(c) of the Act prohibits the respondents from causing or allowing the open burning of refuse . . . "in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board." 415 ILCS 5/9(c) (2010). The record shows that respondents burned refuse at the corporate site. Respondents did not burn the refuse in a chamber or pursuant to regulations adopted by the Board. Therefore the Board finds that respondents violated Section 9(c) of the Act (415 ILCS 5/9(c) (2010)) by open burning refuse on the corporate site.

### **Section 21(a)**

The record demonstrates that the respondents caused or allowed the open dumping of waste at both the residential site and the corporate site. Specifically, the evidence included in the record, and deemed admitted by respondents, indicates that respondents caused or allowed open dumping of miscellaneous wastes at the residential site, including, but not limited to: twisted rebar, dimensional lumber with bent-over nails, cut ends, and splintered sides, protruding rebar, rusty steel pipe and flexible electrical conduit, metal wire intermixed with muddy dredged material, black plastic pipe and a partially crushed blue plastic drum. Comp. at 3-4.

Likewise, the evidence included in the record, and deemed admitted by respondents, indicates that respondents caused or allowed open dumping of miscellaneous wastes at the corporate site, including, but not limited to: used tires, a pickup truck bed liner filled with waste, a demolition debris pile, crushed splinters of lumber, a section of pipe, rusty scrap metal, and broken pallets. Comp. at 11-12.

Section 21(a) of the Act prohibits causing or allowing open dumping of waste. 415 ILCS 5/21(a) (2010). "Open dumping" means the consolidation of refuse (defined, by the Act, as "waste") 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). Neither the residential nor the corporate sites fulfill the requirements of a sanitary landfill, and the aforementioned miscellaneous waste found and

photographed at the corporate site on August 4, 2010, and March 23, 2011 and the residential site on March 23, 2011 meets the definition of “refuse” in the Act. 415 ILCS 5/3.385 (2010).

By causing and allowing the disposal of the miscellaneous wastes at the residential and corporate sites, the respondents caused and allowed the consolidation of refuse at a disposal site that does not fulfill the requirements of a sanitary landfill. Therefore, the Board finds that 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(d)**

Section 21(d) of the Act prohibits conducting a waste-storage, waste-treatment, or waste-disposal operation without proper authorization by the Agency. 415 ILCS 5/12(d) (2010). By disposing of wastes at the residential site without a permit granted by the Agency, respondents conducted a waste-storage or waste-disposal operation without a permit granted by the Agency in violation of Section 21(d)(1) of the Act. 415 ILCS 5/21(d)(1) (2010). The Board finds that by disposing of wastes at the residential and corporate sites, as alleged in the complaint and deemed admitted by respondents, respondents conducted a waste-storage or waste-disposal operation in violation of regulations or standards adopted by the Board under the Act in violation of Section 21(d)(2) of the Act. 415 ILCS 5/21(d)(2) (2010).

#### **Section 21(e)**

By consolidating and disposing of the miscellaneous wastes on the residential and corporate sites, the respondents operated a waste disposal site. The facts alleged in the complaint and deemed admitted by respondents prove that neither Edward Fisher or Rhonda Fisher nor DEM/EX Group applied for or obtained the required permit to dispose of waste on the residential or corporate sites. Comp. at 9. Therefore, the Board finds that the respondents violated Section 812.101(a) of Title 35 of the Board’s regulations by not submitting to the Agency an application for a permit to develop and operate a landfill. 35 Ill. Adm. Code 812.101(a). The Board further finds that respondents also violated 21(e) of the Act (415 ICLS 5/21(e) (2010)), by not obtaining the required permits to operate a waste disposal site in Illinois.

#### **Section 21(p)**

Section 21(p) of the Act prohibits open dumping that results in litter, open burning, or deposition of general construction or demolition debris or clean construction or demolition debris. 415 ILCS 5/21(p)(1), (3), and (7) (2010). The miscellaneous waste discarded on the residential and corporate sites meets the definition of “litter” as set out in the Litter Control Act.<sup>2</sup> 415 ILCS 105/3(a) (2010). By causing open dumping that resulted in litter at the residential and corporate sites, respondents violated Section 21(p)(1) of the Act. The Board finds that the facts

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<sup>2</sup> 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); *see St. Clair County v. Louis Mund*, AC 90-64, slip op. at 6 (Aug. 22, 1991).

deemed admitted by respondents are sufficient to prove that the respondents violated Section 21(p)(1) of the Act. 415 ILCS 5/21(p)(1) (2010).

The complaint alleges that “an open burning debris pile containing ash-charred paper, a wire spiral binding among soot-covered gravel” and “a second burn pile containing metal banding, a rusty tin cap, and scrap metal” were witnessed on the corporate site by the Agency during a March 23, 2011 inspection. Comp. at 13-14. As discussed above, the allegations of the complaint were deemed admitted against respondents. *See supra* pp. 3-4. The Board finds that by causing open dumping that resulted in open burning at the corporate site, respondents violated Section 21(p)(3) of the Act. 415 ILCS 5/21(p)(3) (2010).

The complaint also alleges that open dumping resulted in the deposition of general construction or demolition debris at the residential site and both general construction or demolition debris and clean construction or demolition debris at the corporate site. Comp. at 3-4, 10-14. Observations of the Agency, documented in the inspection reports of the August 4, 2010 and March 23, 2011 site inspections, support these allegations and the allegations were deemed admitted against respondents. Motions at 4-7; *See supra* 3-4.

The Board finds that the facts deemed admitted by respondents are sufficient to prove that the respondents violated Sections 21(p)(7)(i) of the Act at the residential and corporate sites and Section 21(p)(7)(ii) at the corporate site. 415 ILCS 5/21(p)(7)(i)-(ii) (2010).

### **Section 55**

As stated above, Section 55(a) of the Act generally prohibits the open dumping of used or waste tires and Section 55(k) prohibits the accumulation of water in used or waste tires. 415 ILCS 5/55(a), (k) (2010). Count IV of the complaint alleges that respondents caused or allowed the open dumping of used or waste tires at the corporate site and caused or allowed water to accumulate in used or waste tires at the corporate site. Comp. at 17. Observations of the Agency support these allegations and the allegations of the complaint were deemed admitted against respondents. Motions at 4-7; *See supra* 3-4.

The Board finds that the facts deemed admitted by respondents are sufficient to prove that the respondents violated Sections 55(a) and 55(k)(1) of the Act at the corporate site. 415 ILCS 5/55(a), (k)(1) (2010).

### **Ruling on Motion for Summary Judgment**

The Board finds that the facts deemed admitted by respondents, are sufficient to prove that the respondents violated Sections 9(a), 9(c), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(p)(3), 21(p)(7)(i)-(ii), 55(a)(1), and 55(k)(1) of the Act, and Section 812.101(a) of the Board’s regulations. 415 ILCS 5/9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), (k)(1) (2010); 35 Ill. Adm. Code 812.101(a). The Board further finds that the People are entitled to judgment as a matter of law and the Board grants the motions for summary judgment for counts I through V of the complaint.

## **REMEDY AND PENALTIES**

Having found that the respondents violated Sections 9(a), 9(c), 21(a), 21(d)(1) and (d)(2), 21(e), 21(p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), and 55(k)(1) of the Act, and Section 812.101(a) of the Board's regulations, the Board must now determine the appropriate remedy 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 a \$16,000 penalty against each respondent.

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

The People provide brief statements, identical in each of the People's Motions, regarding each of the above factors, as follows: 1) human health and the environment were threatened and the Illinois EPA's information gathering responsibilities hindered by the respondent's violations; 2) there is social and economic benefit to the facility; 3) operation of the facility was suitable for the area in which it occurred; 4) reducing or eliminating emissions and deposits was both technically practicable and economically reasonable; and 5) on information and belief, respondent[s] [have] subsequently failed to comply with the Act and the Board Regulations related to open dumping, specifically related to debris removed from Pekin High School's West Campus in Tazewell County, Illinois and deposited at the property of Joyce Hilst d/b/a Lost Creek Storage cited in VN's L-2012-01059, -01060, and -01061. Motions at 11-12.

Respondents did not reply to the People's Motions; therefore, the Board considers only the People's statements on these factors. The Board finds that the Section 33(c) factors favor the entry of a cease and desist order and the imposition of a civil penalty. The open dumping at the corporate site and the residential site, the open burning at the corporate site, and the disposal of used or waste tires at the corporate site are contrary to the law and the expectations of society and serve no social and economic benefit.

In addition to the People's statements, the Board finds that respondents have avoided Agency permitting programs designed to ensure the Agency, and thus the People, that waste handling activities are being conducted properly. This avoidance not only hinders the Agency's ability to gather information, but also threatens the environment. While there is a benefit to a demolition and excavation contractor such as DEM/EX Group, the business purpose is thwarted by the open dumping at the corporate site. In addition, the newly constructed house at the residential site adds value to the property, but that value is significantly diminished by the open dumping that has occurred.

Respondents have presented the Board with no evidence that respondents are unable to comply with the Act and Board regulations to properly permit the corporate site as a waste handling facility and avoid open dumping at the residential site. The remedy is also supported by the incidence of respondents' continued, alleged violations, evidenced by the VN's listed above.

Having concluded on the basis of the Section 33(c) factors that a penalty is appropriate, the Board next applies the factors of Section 42(h) to consider whether to impose the \$16,000 penalty requested by the People against each respondent. Section 42(h) of the Act provides:

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;
- (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;
- (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.

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).

The violations observed at the residential site continued for a minimum of five months, and those observed at the corporate site continued for a minimum of eight months. Over the duration of the Agency's observations at the sites, no due diligence was taken by respondents to address the violations of the Act. The Board finds that the first two Section 42(h) factors weigh against respondents.

As stated by the People, respondents "gained economic benefits by avoiding landfill permitting cost[s], depositing waste [at] a site other than a landfill, burning waste rather than paying for proper disposal, and avoided the transportation costs, landfill use fees and other costs related to tire disposal." Motions at 13-14. Thus, the Board finds that this factor weighs against respondents and will also serve to deter respondents and others similarly subject to the Act from future violations of the Act.

The Motions state that respondents Edward Fisher and Rhonda Fisher have committed previous violations of the Act related to open dumping at the corporate site. Motions at 14. These violations were resolved before the Board on June 5, 2008. IEPA v. Edward W. Fisher, Rhonda L. Fisher and DEM/EX Group, INC., PCB 08-26 (June 5, 2008). Pursuant to the June 5, 2008 Board Order, respondents were required to pay a civil penalty of \$3,000. In addition, a default judgment was entered against DEM/EX Group in Rock Island County on July 17, 2012 for asbestos demolition notification violations, asbestos emission control violations, and asbestos removal violations. The Board finds that these prior violations bolster the People's argument for a civil penalty in this matter.

Finally, the respondents did not self-disclose these violations to the Agency and did not perform a supplemental environmental project in settlement of this matter. Motions at 14. The Board finds that Section 42(h)(9) is not a factor in this analysis because the respondents did not enter a Compliance Commitment Agreement with the Agency.

In summary, the respondents' violations continued over several months at both the residential site and the corporate site. Respondents, however, did nothing to come into compliance with the Act even after being notified of the violations. The Board finds that

respondents have gained an economic benefit by avoiding transportation costs, permitting fees, and other disposal fees. In light of these facts, other recently adjudicated violations of the Act, and continuing compliance issues at the sites, the Board assesses the \$16,000 civil penalty requested by the People against each respondent, finding that it is sufficient to encourage future compliance by respondents, designed to include any economic benefit enjoyed by respondents, yet is not excessive based on the record.

### **CONCLUSION**

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 motions for summary judgment against respondents Edward Fisher and Rhonda Fisher and DEM/EX Group. The Board therefore finds that the respondents violated 9(a), 9(c), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(p)(3), 21(p)(7)(i)-(ii), 55(a)(1), and 55(k)(1) of the Act, and Section 812.101(a) of the Board's regulations as alleged in the People's five-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 \$16,000 civil penalty against each respondent as requested by the People.

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

### **ORDER**

1. The Board grants the unopposed motions for summary judgment filed by the Office of the Attorney General, on behalf of the People, and finds that Edward Fisher, Rhonda Fisher, and DEM/EX Group violated Sections 9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i), (p)(7)(ii), 55(a)(1), (k)(1) of the Act, and Section 812.101(a) of the Board's regulations. 415 ILCS 5/9(a), (c), 21(a), (d)(1)-(2), (e), (p)(1), (p)(3), (p)(7)(i)-(ii), 55(a)(1), (k)(1) (2010); 35 Ill. Adm. Code 812.101(a).
2. Respondents Edward Fisher, Rhonda Fisher, and DEM/EX Group must each pay a civil penalty of \$16,000 no later than Monday June 17, 2013, 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 Edward Fisher's social security number, Rhonda Fisher's social security number, and DEM/EX Group's federal employer identification number must be included on the respective certified checks or money orders.

3. Respondents 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  
PO Box 19276  
Springfield IL 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the 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. 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) (2010); *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, and 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 16, 2013, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board